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Exclusion Diffusion

Sarah L. Swan

EXCLUSION DIFFUSION

Sarah L. Swan[*]

ABSTRACT

Over the last few decades, municipalities and local governments have increasingly turned to banning and exclusion laws as a means of crime prevention. Banning and exclusion laws prohibit an individual from accessing a particular area or building for a prescribed period of time (often one to five years). Violations frequently trigger penalties of up to a year in jail. Because they are focused on crime prevention, no actual wrongdoing is necessary to trigger these bans: many bans are issued on the basis of mere suspicion.

Banning and exclusion laws most typically forbid suspicious individuals from being in public spaces, like city parks or neighborhoods. But they also extend beyond just public spaces, into spaces that mix public and private aspects, like private businesses open to the public, and public housing. And now, banning and exclusion practices have diffused out into the purely private realm. Through a recent trend of local ordinances, state legislation, and ad hoc initiatives, many private landlords have been empowered to ban a tenant's invited guests from a rental home, on virtually any basis. Landlords can exercise this power solely on personal fiat, though they often do so in partnership with local police.

This Article is the first to surface and critique this expansion of banning and exclusion laws into the private realm of the home. As private rental homes join city streets, neighborhoods, parks, private businesses, and public housing as yet another site of state-driven exclusion and banning, spatial governance becomes nearly totalized. Although carefully constructed exclusionary mechanisms can be a justified crime-prevention tool in certain limited circumstances, landlords' new exclusionary powers, as currently constituted, all but guarantee they will be exercised in the same racially discriminatory manner as prior forms of exclusion from public spaces. These enhanced exclusionary powers increase displacement, evictions, and arrests; link associational rights to property

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ownership in troubling ways; negatively affect family formation; and infringe upon the liberty and privacy rights of already vulnerable populations. For these reasons, this exclusionary expansion should be curtailed.

INTRODUCTION

Banishment is an ancient, dramatic, and symbolically potent punishment.[1] Modern regimes, however, tend to use banishment not as a form of punishment, but as a means of crime *prevention*.[2] Often in response to perceived suspicions or concerns about potential disorderliness, municipalities and local governments have been using trespass and exclusion laws to exclude individuals from all sorts of places.[3] Public facilities, parks, neighborhoods, districts, businesses, public housing, and sometimes even entire cities have all been marked as zones of exclusion that certain people are unable to visit. Typically, these "trespass exclusion" laws work as follows: upon seeing someone deemed suspicious, police officers, city employees, or other individuals associated with the property will inform that suspicious person that they are no longer allowed to be in a particular place and will issue a 'no trespass' order.[4] After receiving this notice, any future attempts to access the property will typically result in arrest and criminal conviction for trespass.[5]

These modern municipal banning laws are the latest in a string of attempts to combat disorder.[6] In the first half of the twentieth century, vagrancy laws did

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[1] The history of the United States is rife with examples of banishment. In 1805, the Virginia legislature required all men and women recently freed from slavery to immediately leave the state. *See* KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 2 (2015). In 1830, the Indian Removal Act banished "Native Americans living east of the Mississippi," and in 1942, an executive order banished "people of Japanese descent from the West Coast." Gordon Hill, *The Use of Pre-Existing Exclusionary Zones as a Probationary Condition for Prostitution Offenses: A Call for the Sincere Application of Heightened Scrutiny*, 28 SEATTLE U. L. REV. 173, 174 (2004). In 1959, a judge offered Richard Loving and Mildred Loving a suspended jail sentence if they agreed to be banished from the State of Virginia for twenty-five years. Peter Wallenstein, *The Right to Marry:* Loving v. Virginia, 9 ORG. AM. HIST. MAG. 37 (1995).

[2] Katherine Beckett & Steve Herbert, *Dealing with Disorder: Social Control in the Post-Industrial City*, 12 THEORETICAL CRIMINOLOGY 5, 10 (2008).

[3] *See id.*

[4] This notice is usually a written form. For example, in Denver, Colorado, police must issue a "suspension notice" if they wish to exclude someone from a park. The suspension notice must meet the following requirements: it "shall be issued in writing on a form approved by the Parks and Recreation Director and signed, with identifying information, by a Denver Police Officer. The Suspension Notice shall include: (1) a brief description of the conduct which is in Violation; (2) the date of the issuance; (3) the City Parks of the Cherry Creek Greenway for which the Suspension Notice is applicable; and (4) notice of the right and process to appeal the Suspension Notice." DENVER PARKS & RECREATION, TEMPORARY DIRECTIVE: SUSPENSION OF RIGHT OF ACCESS OF PARTIES ENGAGED IN DRUG-RELATED ACTIVITY FROM CITY PARKS AND THE CHERRY CREEK GREENWAY appx.A, at 3 (2016), http://static.aclu-co.org/wp-content/uploads/2017/01/2017-2-22-Holm-order-of-dismissal.pdf.

[5] A trespass conviction is often punishable by "a penalty of up to one year in jail and a $5000 fine." KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 58 (2010).

[6] The reasoning behind such laws is that "if police 'could engage in prophylactic arrests, that is, arrest people before they committed the crimes, [the police] would be able to control the streets.'" Martha Middleton,

this work. Vagrancy statutes criminalized "habitual loafers,"[7] "disorderly persons,"[8] persons "wander[ing] without destination or visible means of support,"[9] and persons "strolling around from place to place without any lawful purpose or object."[10] In a series of cases in the 1960s and 1970s, these laws were found to be unconstitutionally vague.[11] Cities then turned to civility laws, which were more specific than vagrancy laws in that they criminalized particular behaviors related to disorder, like aggressive panhandling, public urination, and sitting on sidewalks.[12] Civility laws could withstand more constitutional challenges, but their specificity also made them less useful to cities.[13]

Banning and exclusion laws are the "more muscular successor" to these vagrancy and civility codes.[14] Like the vagrancy and civility laws before them, banning and exclusion laws are most interested in restoring order in *public* spaces.[15] But these laws also possess an "expansionary logic,"[16] such that they have come to exclude not just people in public spaces, but also more private spaces, like businesses open to the public[17] and public housing complexes.[18]

Gang Law Will Meet Court Test, NAT'L L.J. 3, 40 (1992) (quoting Harvey M. Grossman, legal director of the Chicago division of the ACLU).

[7] Papachristou v. City of Jacksonville, 405 U.S. 156, 156–57 n.1 (1972); BECKETT & HERBERT, *supra* note 5, at 21.

[8] *Papachristou*, 405 U.S. at 156–57 n.1.

[9] BECKETT & HERBERT, *supra* note 5, at 12.

[10] *Papachristou*, 405 U.S. at 156–57 n.1; RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 1 (2016).

[11] *Papachristou*, 405 U.S. at 162. Justice Douglas noted that vagrancy laws were "a convenient tool for 'harsh and discriminatory enforcement'" and created "a regime in which the poor and unpopular [we]re permitted to 'stand on a public sidewalk . . . only at the whim of a police officer.'" *Id.* at 170.

[12] BECKETT & HERBERT, *supra* note 5, at 40. For a discussion of the role of municipalities in generating criminal law, see Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001).

[13] *See* BECKETT & HERBERT, *supra* note 5, at 40.

[14] *Id.* at 17.

[15] *Id.*; *see* GOLUBOFF, *supra* note 10, at 2.

[16] BECKETT & HERBERT, *supra* note 5, at 19.

[17] Jason D. Williamson, *If You're White, You're a Customer. If You're Black, You're Trespassing*, ACLU (Apr. 15, 2015), https://www.aclu.org/blog/criminal-law-reform/reforming-police/if-youre-white-youre-customer-if-youre-black-youre. The police are then ostensibly able to, at their discretion, order virtually anyone off a private business premise that is otherwise open to the public. *Id.* In Grand Rapids, Michigan, for example, police officers would ask business owners to agree to sign a "No Trespass Letter[]" and to post a no trespassing sign on their business premises. *Id.* Officers believed that this granted them "unrestricted discretion to decide who [did] and [did] not belong on the property of an open business" and allowed them "to stop and arrest people for trespassing at the business in question – even while the business is open – whenever the officer [thought] the person [was] on the property without a 'legitimate business purpose.'" *Id.*

[18] Activities that can land someone on public housing ban lists vary, from serious crimes, to low-level disorderly acts like "unreasonable noise," "littering," "parking in front of a dumpster," or "impeding traffic flow," to essentially status wrongs like having a previous criminal conviction, to, in the most capacious form of the ban, simply being a non-resident. Gregory A. Beck, *Ban Lists: Can Public Housing Authorities Have*

Trespass exclusion laws have now also come to govern the purely private space of rental homes. Traditionally, renters have held the right of exclusion: the standard common law position is that renters in possession of the property have the right to decide who may or may not visit them there.[19] Now, though, through a combination of ordinances, case law, state legislation, and ad hoc police and landlord initiatives, many jurisdictions have reversed that position, such that landlords and police in many municipalities now have banning authority over guests in rented homes. Guests who have been banned can be arrested if they attempt to access the property again, and the tenants associated with them can be evicted.[20]

This expansion of landlord exclusionary powers is occurring across the nation. Arizona has enacted legislation that enables landlords to have a tenant's guests removed at the landlord's sole behest.[21] The Illinois Code of Civil Procedure currently declares that landlords can ban anyone who is not on the lease and is not a member of the lessee's household.[22] Landlords are exercising similar powers in cities and towns in Michigan,[23] and in Madison, Wisconsin.[24] Under one recent initiative, the Madison Police Department encouraged landlords to erect "No Trespassing" signs, which officers believed allowed them to "declare any non-resident on the property to be trespassing."[25] Under this broad power, "family members – even those who may be providing critical support, like child care – cannot visit tenants" if police disapprove.[26]

This expansion of banning and exclusion into the private realm of the home is deeply problematic. First, the cumulative impact of adding private rental homes to the multitude of spaces where individuals may be excluded on threat of criminal penalty means that with the sole exception of owner-occupied homes, nearly every conceivable urban space is potentially subject to state-driven exclusion. Second, the special significance of "home" in the cultural and legal imagination makes exclusion from them particularly damaging. Third,

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Unwanted Visitors Arrested?, 2004 U. ILL. L. REV. 1223, 1237 (2004) (citation omitted).

[19] Under the common law, tenants had the right to invite guests on the property, and such a guest would not be a trespasser, even if a landlord attempted to ban them. *Id.* at 1229.

[20] *See id.* at 1234–35.

[21] ARIZ. REV. STAT. ANN. § 33-1378 (2015).

[22] Ill. Code of. Civ. Proc. § 9-106.2(f) (2013).

[23] Jim Schaafsma, *Responding to Landlord Use of a Trespass Policy that Interferes with Guest Visits*, MICH. POVERTY L. PROGRAM (2020) (on file with author).

[24] *See* Abigail Becker, *ACLU Investigating Several Madison Police Department Policies*, CAP. TIMES (May 20, 2016), https://madison.com/ct/news/local/govt-and-politics/aclu-investigating-several-madison-police-department-policies/article_530ea610-0a6d-5512-94e7-975b8b01995c.html.

[25] *Id.*

[26] *Id.*

unfettered exclusionary powers over public spaces have thus far been exercised in demonstrably racially discriminatory ways, and there is good reason to believe that pattern will continue when applied to homes as well. Finally, enhanced landlord exclusionary power infringes on rights of association; reifies existing social hierarchies; offends the privacy, autonomy, and dignity rights of both tenants and guests; affects family formation; and can lead to eviction and arrest.

Crime prevention is, of course, a laudable goal, and there might be good reasons to sometimes prohibit people who have engaged in certain forms of wrongdoing from coming onto rental properties, particularly in shared living situations like apartment buildings.[27] However, bans are currently triggered not by wrongdoing, but instead by suspicion regarding future wrongdoing.[28] Landlords have no particular expertise or knowledge in this regard (and, remarkably, the police are not very good at predicting future wrongdoing either).[29] Not surprisingly then, the available evidence, most of which comes from the public housing context, suggests that residential banning on this basis is not an effective means of crime prevention.[30] The available evidence shows banning has only a "modest impact on property crime" and "no significant impact on violent crime" at all.[31]

Weighed against the myriad negative effects of banning guests, a modest reduction in property crime seems a rather trivial benefit. And, in fact, a modest reduction in property crime on the premises may come at the cost of *increased*

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[27] *See, e.g.*, U.S. DEP'T OF JUST., KEEPING ILLEGAL ACTIVITY OUT OF RENTAL PROPERTY: A POLICE GUIDE FOR ESTABLISHING LANDLORD TRAINING PROGRAMS vii (2000).

[28] These bans thus differ from the protection orders issued following incidents of domestic violence, which also ban individuals from homes but are predicated more on wrongdoing that has already taken place than on the suspicion of future wrongdoing. *See* JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 18 (2009).

[29] "For example, in 2006 alone the New York City Police Department [NYPD] made 508,540 stops or stop-and-frisks, a 500% increase over those made during the preceding year. Yet in only 10% of these cases did police make arrests or issue summonses, an apparent error rate . . . of 90%." Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 10 (2010). Further, "[o]f those persons stopped by the NYPD in 2006, 45% of Blacks and Latinos were also frisked, compared to only 29% of Whites, 'even though [W]hite suspects were 70% more likely than Black suspects to have a weapon.'" *Id.* at 11; *see also* Ligon v. City of New York, 925 F. Supp. 2d 478, 530 (S.D.N.Y. 2013) ("[W]hen police officers are in an area where they are primed to look for signs that 'crime is afoot,' they may be more likely to perceive a gesture as an indicator of criminality. Recent psychological research has provided evidence of such cognitive distortions. . . . [O]fficers may have a systematic tendency to see and report furtive movements where none *objectively* exist."); Gill v. N.Y.C. Hous. Auth., 519 N.Y.S.2d 364 (App. Div. 1987) (noting that there are "widely recognized inherent difficulties in predicting dangerousness").

[30] Jose Torres, Jacob Apkarian & James Hawdon, *Banishment in Public Housing: Testing an Evolution of Broken Windows*, 5 SOC. SCI. 61, 61 (2016).

[31] *Id.* at 62.

crime more generally. It is well-known that strong social and familial bonds are a significant deterrent to crime of all kinds.[32] Exclusions work against these bonds, and therefore ironically may not only fail to prevent crime, but might actually themselves be criminogenic.[33]

As a first-best solution, jurisdictions that have adopted enhanced landlord exclusionary powers should revert back to the standard common law position that only tenants hold the right to exclude. Expanding a landlord's power was not done in response to any particular shortcoming or failing with this approach, nor to any particular problem that needed resolving—nothing was demonstrably wrong with this status quo. Moreover, even without enhanced exclusionary powers, landlords still have access to numerous mechanisms that provide them with the necessary tools to address any potentially problematic guests.[34]

As a second-best solution, enhanced powers of exclusion should be limited. Some cities and advocacy groups have proposed a number of differing limitations, all of which are better than the current broad discretion offered. Banning could be limited to situations where a guest has "engaged in criminal activity on or near the premises that poses a threat to the residents,"[35] or been "arrested for engaging in criminal activity on the property,"[36] or committed "conduct on the landlord's property which violates the lease or the law."[37] All of these suggestions link banning to specific wrongful acts committed on the

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[32] *See, e.g.*, DAVID HALPERN, SOCIAL CAPITAL 123 (2005); Todd R. Clear, Dina R. Rose, Elin Waring & Kristen Scully, *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 33, 34 (2003); Christopher Salvatore & Travis A. Taniguchi, *Do Social Bonds Matter for Emerging Adults?*, 33 DEVIANT BEHAV. 738, 739 (2012). *See generally* Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 LAW & SOC'Y REV. 285, 285 (1993).

[33] Academics have been recently studying "the idea that governmental crime prevention and community safety measures may themselves be significant ecological factors in the generation of crime." Scott Duffield Levy, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 541 (2008) (emphasis omitted); *see* Clear et al., *supra* note 32, at 34; Jeffrey Fagan, Valerie West & Jan Hollan, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1552–53 (2003); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 192 (1998); Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441, 442 (1998).

[34] Like anyone else, landlords can always call the police if they see someone engaged in criminal activity. Additionally, landlords can deploy the civil procedures connected to eviction. *See infra* Part IV.

[35] *See* Becker, *supra* note 24.

[36] Memorandum from David Gehrig and Charlie Smyth on Criminal Trespass Applied to Tenant's Invited Guests to Mayor Prussing and Urbana City Council (Nov. 5, 2009) (on file with author) [hereinafter Gehrig & Smyth].

[37] MARTIN WEGBREIT, VIRGINIA RESIDENTIAL LANDLORD – TENANT LAW (A COMPREHENSIVE OVERVIEW), at V.K.1 (2014).

property, a more justifiable basis than the standard of mere suspicion that currently governs most residential banning decisions.[38]

This Article proceeds as follows: Part I describes the diffusion of banning and exclusion laws through public and private spaces and details the new trend of enhanced landlord exclusionary powers. Part II presents the problems associated with bringing banning and exclusion laws into private rental homes. Part III offers the arguments in favor of enhancing landlord exclusionary powers and finds that they do not outweigh the burdens imposed. Part IV examines various proposals for circumscribing landlord exclusionary powers and considers the constellation of constitutional and other legal claims available for tenants and guests impacted by these banning practices.

I. FROM PUBLIC TO PRIVATE

The "'right to exclude' is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[39] Decades ago, local governments realized that they could "borrow this treasured strand of the property-rights bundle to augment order-maintenance efforts," and they began implementing numerous forms of trespass exclusion laws and policies in public spaces.[40] So, although trespassing is most frequently associated with *private* property in the cultural imagination, as a means of social order control in the city, state-sponsored trespass exclusion is widely practiced in public spaces, and in public-private places like businesses and public housing, and, through expanded landlord exclusionary powers, in the private realm of the home.

A. Banning in Public Spaces

As sociologists have documented, municipalities of all sizes and stripes employ a variety of exclusionary practices in spaces like public facilities, parks, neighborhoods, downtown business districts, sidewalks, and in some cases, entire cities.[41] Taking the form of parks and public facilities banning, injunctions and gang ordinances, off-limits orders for areas with drugs or

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[38] *See* SUK, *supra* note 28.

[39] Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1093 (2005) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

[40] *Id.*

[41] BECKETT & HERBERT, *supra* note 5, at 50. As a small sampling, cities as varied as New York City, New York; Los Angeles, California; Las Vegas, Nevada; Portland, Oregon; Cincinnati, Ohio; Boston, Massachusetts; and Richmond, Virginia, all employ exclusionary practices. *Id.* at 8.

prostitution, and banning from entire cities, these practices have made trespass exclusion a common practice in public spaces.

1. Parks and Public Facilities Banning

In some localities, law enforcement and other city officials are able to ban or "trespass" individuals from public facilities like parks, libraries, hospitals, transit systems, and social service agencies, for periods often exceeding a year.[42] Notably, a ban from one public place can also be extended beyond the site of the initial banning order. So, for instance, a park exclusion can apply to "one, some, or all city parks."[43] Banning can occur for "virtually any reason,"[44] but typically the notices are issued after a city employee has observed some kind of rule violation, or witnessed disorderly conduct, or sometimes merely because that employee has suspicions about the targeted individual.[45]

Prior to these exclusion laws, removing a person from a place like a public park required "probable cause that they had committed [a criminal] offense."[46] But trespass exclusion orders are characterized as a civil remedy, meaning that "[n]o evidence of wrong-doing is required" to issue them.[47] Indeed, in places like Seattle, police officers need not even document the reason for the trespass exclusion order.[48]

Once these civil orders are issued, it is a criminal offense to violate them.[49] In other words, police will often issue a civil trespass order because they believe someone looks suspicious, and that order will enable them to arrest that individual if that individual violates the order by coming onto the property from which they have been excluded.[50] As one officer stated: "you can . . . trespass

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[42] Beckett & Herbert, *supra* note 2, at 10. "Trespass exclusion" is a term coined by the American Prosecutors Research Institute. *Id.* at 11. As an example of one of these ordinances, Puyallup, Washington, has an ordinance that reads as follows: "If the City has reasonable grounds to believe that a person has violated an applicable law or rule while such individual is on or within any city or other publicly owned facility, building, or outdoor area, the city manager or designee may prohibit the person from entering or remaining in or upon the real property of the city of Puyallup by issuing a notice of trespass to the person." Puyallup, Washington, Municipal Code § 9.20.250. This ordinance did contain an appeal mechanism, albeit a limited one. *Id.*

[43] Katherine Beckett & Steve Herbert, *Penal Boundaries: Banishment and the Expansion of Punishment*, 35 LAW & SOC. INQUIRY 1, 7 (2010).

[44] S. LEGAL COUNS., JAILBIRDS IN THE SUNSHINE STATE: DEFENDING CRIMES OF HOMELESSNESS 49 (2016).

[45] Beckett & Herbert, *supra* note 2, at 9.

[46] BECKETT & HERBERT, *supra* note 5, at 13.

[47] Beckett & Herbert, *supra* note 2, at 10.

[48] *Id.* at 11.

[49] *Id.* at 10.

[50] *Id.*

anybody for anything . . . and then [the admonishment] gives you a year, worth of, you know, being able to shake 'em, and pat 'em down[.]"[51] Once issued, there is often no mechanism to appeal or challenge the basis or scope of the exclusion order.[52]

2. *Injunctions and Gang Ordinances*

Cities have also deployed banning and exclusionary measures in public spaces to combat gang activity. In 1992, Chicago enacted its Gang Congregation Ordinance, which prohibited gang members from loitering with anyone else in a public place and subjected any suspected members—and those in their vicinity—to orders of immediate dispersal.[53]

In 1999, the Supreme Court ruled that this ordinance was unconstitutionally vague, so cities began more fervently using a different banning and exclusionary measure: gang injunctions.[54] Cities like Fort Worth, Texas; San Francisco, California; and Los Angeles, California, civilly sued street gangs, with the goal of receiving injunctions barring gang members from "gathering on street corners" or "being within a specified target area."[55] While injunctions had a brief moment of immense popularity with cities—at one time Los Angeles had thirty-three permanent injunctions against fifty gangs[56]—they have received significant criticism and some courts have found these injunctions to be

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[51] *Id.* at 11.

[52] *Id.* at 10. Seattle, though, offered individuals who had been excluded for more than seven days the opportunity to challenge that exclusion. BECKETT & HERBERT, *supra* note 5, at 48. That said, "[t]here are several important barriers to submitting an appeal: the accused does not have the right to legal representation; the written appeal must be postmarked within one week of the exclusion order; and the phone number that is provided on the form for those who have questions about submitting an appeal is, at the time of this writing, the phone number of a community center, the staff of which knows nothing about appealing a parks exclusion. According to Park Security, only ten to twelve of the thousands of people who have been excluded from city parks in the past decade have appealed their exclusion. A successful appeal occurred in just two of these cases." *Id.*

[53] City of Chicago v. Morales, 527 U.S. 41, 41 (1999). Anyone who did not disperse faced a maximum punishment of a fine of $500, less than six months imprisonment, and 120 community service hours. *Id.* at 47.

[54] Karen M. Hennigan & David Sloane, *Improving Civil Gang Injunctions: How Implementation Can Affect Gang Dynamics, Crime, and Violence*, 12 CRIMINOLOGY & PUB. POL'Y 7, 7, 9 (2013).

[55] BECKETT & HERBERT, *supra* note 5, at 9; *see In Bid to Curb Violence, Cities File Lawsuits Against Gangs*, N.Y. TIMES (July 30, 2007), https://www.nytimes.com/2007/07/30/us/30gangs.html; J. Brian Charles, *The Right to an Attorney*, GOVERNING MAG., June 1, 2019, at 53.

[56] *In Bid to Curb Violence, Cities File Lawsuits Against Gangs*, *supra* note 55. Additionally, "in 2010, Los Angeles police expanded the use of injunctions beyond just gangs," and "issued an injunction against John Does – eighty known drug dealers and 300 others with any potential connection around the Skid Row area." Marc L. Roark, *Homelessness at the Cathedral*, 80 MO. L. REV. 53, 79 (2015).

unconstitutional.[57] Accordingly, cities are now moving away from injunctions and focusing on other exclusionary mechanisms.[58]

3. Off-Limits Orders for Areas with Drugs or Prostitution

For one kind of banning mechanism—off-limits orders—cities do require at least an arrest to have occurred before they will exclude individuals from public neighborhoods.[59] Off-limits orders are imposed as a post-arrest or post-conviction measure.[60] Individuals arrested or convicted of drug offenses can be issued a Stay Out of Drug Area (SODA) order, or, if the offense was prostitution-related, a Stay Out of Areas of Prostitution (SOAP) order.[61] The areas designated in such SODA and SOAP orders often "comprise significant parts of the city."[62] In Seattle, for example, "roughly half of the city's terrain, including all of downtown, is defined as a 'drug area' from which someone might be banned."[63] A typical order lasts for two years.[64]

Cities like Seattle, Washington; Portland, Oregon; and Cincinnati, Ohio, have employed this banning technique, and large numbers of people have been subject to such orders.[65] Between 1996 and 2000, Cincinnati banned more than

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[57] *See, e.g.*, Julian Mark, *San Francisco City Attorney Pledges to End Gang Injunctions by Year's End*, MISSION LOC. (April 29, 2019), https://missionlocal.org/2019/04/san-francisco-city-attorney-pledges-to-end-gang-injunctions-by-years-end/. It is also not clear that civil gang injunctions were ever effective. One review of the studies on the effectiveness of civil gang injunctions concluded they offered "mixed findings [which] suggest that gang injunctions may be modestly effective in reducing crime and fear 6 months or a year after, but not uniformly so." Hennigan & Sloane, *supra* note 54, at 10.

[58] Beckett & Herbert, *supra* note 2, at 10. Many cities impose off-limits orders as part of a post-conviction probationary regime. *Id.* at 13–14. Seattle will issue such orders following just an arrest. *Id.*

[59] *Id.*

[60] *See id.* Some municipalities establish the terms of Stay Out of Areas of Prostitution (SOAP) orders and their areas by ordinance. *Id.* In other municipalities, such as Seattle, SOAP areas are defined by the city attorney's office and imposed by the municipal court. *Id.* at 25 n.10. Additionally, in some cities, the order prohibits the individual's presence twenty-four hours a day for the probationary period, while in other cities, the order may cover only certain times of the day. *See* BECKETT & HERBERT, *supra* note 5, at 7, 9, 41, 50.

[61] *See* BECKETT & HERBERT, *supra* note 5, at 7, 9, 41, 50.

[62] Beckett & Herbert, *supra* note 2, at 14.

[63] *Id.* at 14–15.

[64] *See, e.g.*, Marysville, Washington, Municipal Code § 6.28.040; Monroe, Washington, Municipal Code § 9.25.050; Everett, Washington, Municipal Code § 10.24.220. Individuals are "prohibited from being in the proscribed areas for any reason; violations may lead to the imposition of a year-long jail term." Exceptions are ostensibly available for people who "live, work, or have other 'legitimate' reasons to be in the proscribed areas," but "judges' willingness to grant them varies a good deal, and enforcement remains highly discretionary." Beckett & Herbert, *supra* note 2, at 15.

[65] *Id.* at 13–14; *see* Kelli Caplan, *Drug Zones Get Mixed Reaction*, DAILY PRESS (Mar. 9, 1997), http://www.dailypress.com/news/dp-xpm-19970309-1997-03-09-9703090095-story.html (describing Charlottesville's SODA program); Petra L. Doan, *Regulating Adult Business to Make Spaces Safe for Heterosexual Families in Atlanta*, *in* (SUB)URBAN SEXSCAPES: GEOGRAPHIES AND REGULATION OF THE SEX

1,500 people from the troubled Over-the-Rhine neighborhood.[66] Between 2001 and 2005, off-limits orders in King County, Washington, increased from being issued to 7.1% of felony drug offenders, to being issued to 30.1%.[67]

4. Banned from the Entire City

In some remarkable instances, defendants have been banned from entire cities.[68] After receiving a no-trespass order for a forty-square-block business district in Wilmington, Delaware, for what the police say was aggressive panhandling and resisting arrest, Isiah Barnett, a nineteen-year-old, received an order banning him from the entire city.[69] Modeled after the kind of 'no contact' order issued in domestic violence or other criminal cases where courts want to keep victims safe from perpetrators, the order declared:

> You are ordered to have no contact, direct or indirect, with the ENTIRE CITY OF WILMINGTON, DE (hereinafter the "Alleged Victim"), or with the alleged victim's property, residence, place of employment, school, church, or at any other place.[70]

Violating the order was punishable by imprisonment for up to a year.[71] An attorney representing Isiah Barnett indicated that he was aware of three other defendants charged with similar vagrancy-related crimes who were also banned from Wilmington while their cases were pending.[72]

INDUSTRY 197 (Paul J. Maginn & Christine Steinmetz eds., 2015) (noting that municipal regulation was used to relocate LGBTQ individuals from "spaces in which they could gather without being discriminated against").

66 Garnett, *supra* note 39, at 1122.

67 Beckett & Herbert, *supra* note 2, at 15.

68 Many states constitutionally limit the possibility of banning people from that state, and "[c]ourts now prohibit interstate banishment." BECKETT & HERBERT, *supra* note 5, at 10. But, in regard to localities, the situation is less clear. "[F]ive states permit intrastate banishment, that is, the legal expulsion of a citizen from a town or county." *Id.*

69 Christina Jedra, *Loitering, Panhandling Can Get You Banned from Wilmington*, DEL. NEWS J. (Dec. 5, 2018, 2:11 PM), https://www.delawareonline.com/story/news/2018/12/05/accused-loiterers-and-panhandlers-getting-banned-wilmington/2190018002/.

70 *Id.*

71 *Id.*

72 *Id.* A woman in Montreal also found herself banned from the entire city of Montreal, Canada, after a series of prostitution convictions. MARIE-EVE SYLVESTRE, NICHOLAS BLOMLEY & CÉLINE BELLOT, RED ZONES: CRIMINAL LAW AND THE TERRITORIAL GOVERNANCE OF MARGINALIZED PEOPLE 3 (2019). While near the end of her probation for one conviction, she was arrested again for communicating for the purposes of prostitution, and the police officer, "[a]fter hearing that [she] had recently moved out of Montreal, . . . chose to include a complete ban from the Island of Montreal in her promise to appear with an undertaking." *Id.* She violated that ban, including when her mother died in Montreal, and was sentenced to nearly two months incarceration and a subsequent two-year ban from the city. *Id.* at 4.

B. Banning in Public/Private Spaces

In addition to banning in public spaces, municipalities and other local governments also use banning mechanisms in spaces that have both public and private aspects, like private businesses that are open to the public, and public housing. "Trespass affidavit programs" on business premises and ban lists in public housing helped pave the path for banning practices in purely private housing.

1. Businesses

Cities have been expanding their exclusionary reach into business premises that are privately owned but open to the public. Through "trespass affidavit programs," police request that businesses post a sign and authorize a letter or affidavit granting the police the power to arrest people for trespass, even when someone is visiting the business during open hours.[73] These trespass affidavit programs have led to hundreds of thousands of police encounters.[74] For example, in Miami Gardens, Florida, a city with a population of roughly 110,000 residents, police made an estimated 99,000 stops over a five-year period using the trespass affidavit program.[75]

While the enormous number of stops in Miami Gardens is relatively unusual, thousands of stops in a five-year period is typical for places using trespass affidavit programs. In Grand Rapids, Michigan, approximately 800 individuals were stopped at businesses with trespass programs between 2011 and 2013.[76]

Usually, trespass affidavit programs leave it to the police to decide who is and is not a potential customer on the business premises.[77] Looking at "the totality of the circumstances," officers determine "in their discretion" whether

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[73] *See, e.g.*, HOUS. POLICE DEP'T, INSTRUCTIONS TO RESIDENTS: EXECUTING TRESPASS AFFIDAVITS (2019), www.houstontx.gov/police/pdfs/Trespass-Affidavit-Business.pdf; DALL. POLICE DEP'T, CRIMINAL TRESPASS AFFIDAVIT (n.d.), https://dallas.police.net/divisions/Shared%20Documents/SE_Criminal_Trespass_Affidavit.pdf.

[74] *See* Williamson, *supra* note 17.

[75] *Id.*

[76] Hightower v. City of Grand Rapids, 407 F. Supp. 3d 707 (W.D. Mich. 2018). Nearly half of those stops were police-initiated; the other half were citizen-initiated. *Id.*

[77] Normally, private business owners can ban others from their premises for non-discriminatory reasons. Kay Bosworth, *The Legal Rights of a Business to Ban a Person from Their Property*, CHRON (Mar. 8, 2019), http://smallbusiness.chron.com/legal-rights-business-ban-person-property-65571.html ("Offering merchandise for sale implies an invitation to enter, but the store owner is entitled to ban someone from coming in . . . as long as it is not based on bias against a federally protected class of people."). Trespass affidavit programs reassign that discretion to the police. *See supra* note 73.

the individual was on the property for a "commercial purpose."[78] As one judge noted in condemning the trespass affidavit program, "a letter of which the public is generally unaware and a small [no trespassing] sign made all who entered [the business] property that was held open to the public subject to immediate arrest without warning" on the basis that they were viewed as vaguely suspicious.[79]

Like exclusions from public facilities, exclusions under trespass affidavit programs can also ban someone from more than just the initial site. In Seattle, for example, under a motel and parking lot trespass program, anyone "excluded from one of the participating businesses is excluded from all of the properties owned by signatories of the agreement."[80] So, "someone who is trespassed from one parking lot may be arrested for criminal trespass," if they subsequently wander through one of approximately 300 additional parking lots in the downtown area owned by the same entity.[81]

2. Public Housing

The other major public/private site where significant trespass exclusion activity takes place is public housing. In the late 1980s, police officers who found that park bannings were a handy device suggested that public housing authorities could adopt a similar tact and use trespass exclusion to remove and exclude "undesirable drug dealers."[82] Since then, thousands of public housing complexes have heeded that suggestion. A 2003 survey indicated that 85% of public housing authorities had adopted "ban lists," lists of individuals who have been told they have been excluded from the property and that any additional attempts to access it will result in an arrest for trespass.[83]

In their most extreme form, ban lists "ban nearly all non-residents."[84] These lists do not depend on even suspicion; they instead impose a blanket rule that no non-residents may be on the premises.[85] Such broad bans prevent even the relatives of residents in the building, including non-custodial parents of children who live there, from visiting.[86]

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78 *Hightower*, 407 F. Supp. 3d at 730.

79 People v. Maggit, 903 N.W.2d 868, 874 (Mich. Ct. App. 2017).

80 Beckett & Herbert, *supra* note 2, at 12.

81 *Id.*

82 Kimberly E. O'Leary, *Dialogue, Perspective and Point of View as Lawyering Method: A New Approach to Evaluating Anti-Crime Measures in Subsidized Housing*, 49 WASH. U. J. URB. & CONTEMP. L. 133, 139 (1996) (citation omitted).

83 Torres et al., *supra* note 30, at 62.

84 Beckett & Herbert, *supra* note 2, at 11.

85 *Id.*

86 Elena Goldstein, *Kept Out: Responding to Public Housing No-Trespass Policies*, 38 HARV. C.R.-C.L.

Other ban lists rely on police officers to decide who should be placed on a ban list. Here, suspicion again suffices: no arrest, prosecution, or conviction is required to place someone on a ban list.[87] Ban lists have become such a common feature of public housing that trespass enforcement is arguably part of its very "fabric, . . . especially those places where black residents are the majority population group, placing both its residents and visitors under a firm police gaze."[88] The ban lists are often extensive: in Dayton, Ohio, five years after starting a ban list, "there were 2,310 individuals who had been trespassed off [housing authority] property."[89]

Courts have frequently, but not entirely consistently, held that these ban lists trump a tenant's invitation.[90] When a public housing authority has said that someone cannot be on the property, even if a tenant specifically invites that person to their home as a guest, many courts hold that the public housing authority's wishes will override, and that visitor will be subject to arrest for trespassing.[91]

Often, the justification for allowing a public housing authority to override a tenant's rights in this regard is that public housing has a "public" aspect.[92] For instance, in one case challenging the use of ban lists at a public housing complex in Pennsylvania, the court noted that "[u]nder Pennsylvania case law, *private landlords do not have* [the right to exclude a tenant's invited guests]."[93] Nonetheless, the court went on to find that "the unique circumstances surrounding public housing permit public housing authorities to exercise greater control in this regard."[94] Noting "how easily public housing projects can turn into crime-infested slums," the court found that "public housing authorities must have the ability to ban dangerous individuals from their premises and evict

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L. REV. 215, 217 (2003).

87 *Id.*

88 Jeffrey Fagan, Garth Davies & Adam Carlis, *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUDS. 697, 722 (2012).

89 O'Leary, *supra* note 82, at 140.

90 *See* People v. Finch, 991 N.Y.S.2d 552, 559 (N.Y. 2014).

91 As the court noted in *People v. Finch*, "[t]he question of when nonresidents of public housing may be treated as trespassers is complicated . . . . The rule relied on by County Court, that one who has been invited by a tenant cannot be a trespasser, may be generally correct, but it is not immutable. A lease provision or regulation might permit management, at least in some circumstances, to override a tenant's wishes." *Id.* at 559.

92 *See, e.g.*, Brief of Appellee at 10, Lycoming County Housing Authority v. Klopp, No. 00856MDA99, 1999 WL 33889601 (Pa. Super. Ct. 1999).

93 *Id.* (emphasis added).

94 Lycoming County Housing Authority v. Klopp, No. 98-01,890,98-02,009, at 1, 2 (Ct. C.P. Lycoming Cnty. 1999).

tenants who invite them–before they ruin public housing for everyone."[95] The court found the fact that the case before it involved public housing "makes a tremendous difference," and justifies certain kinds of restrictions that would not be considered acceptable without that "public" aspect.[96]

C. Banning in Private Rental Housing

Once trespass exclusion was made part of public housing, its diffusion into purely private housing was perhaps inevitable.[97] Although trespass exclusions in public housing initially hinged on the "public" aspect, having trespass exclusion present in any kind of housing likely normalized the idea of having landlords and police exercise such powers, and private housing soon followed suit. Banning and exclusion laws came into private rental housing in two forms: (1) residential trespass affidavit programs, which let police and landlords ban non-residents but not invited guests, and (2) a trend of case law, legislation, and ad hoc initiatives, which empowered landlords and police to ban any non-resident, including invited guests.

1. Trespass Affidavit Programs

Private landlords now often engage in *residential* trespass affidavit programs and provide police with authority to make trespass-based arrests in apartment buildings.[98] Under these residential trespass affidavit programs, police partner with private landlords to patrol the common areas of apartment buildings. These patrols are meant to let police ban people who are "*not* tenants or legitimate visitors."[99] So, unlike in public housing, invited guests are theoretically not

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[95] *Id.*

[96] *Id.* at 14.

[97] The "one strike" policy, which provided for the eviction of a family if any member engaged in wrongdoing, made a similar migration, starting in public housing and then expanding into private housing as well. *See* Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 846 (2015); Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65 UCLA L. REV. 1146 (2018). Domestic violence "stay away" orders also exclude people from the home, though typically as a post-arrest measure. *See* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 14, 19 (2006).

[98] *See* L.D.L. v. State, 569 So. 2d 1310, 1311 (Fla. Dist. Ct. App. 1990) (acknowledging that it was the policy of a "low-rent federally subsidized housing project" to give the Tallahassee Police Department authority "to issue no trespass warnings and/or to arrest any persons loitering on the property who are not residents"); Alexis Karteron, *When Stop and Frisk Comes Home: Policing Public and Patrolled Housing*, 69 CASE W. RSRV. L. REV. 669, 680–81 (2019) (demonstrating that landlords receiving some federal funding do so as well).

[99] Jessica Grunenberg, *NYPD Memo Orders Cops Not to Stop People Simply for Being in Public Housing*, PIX11 (March 16, 2015, 10:24 PM), http://www.pix11.com/2015/03/16/nypd-memo-orders-cops-not-to-stop-people-simply-for-being-in-public-housing/ (emphasis added).

subject to banning under these private trespass exclusion policies, and are supposed to be exempt from any allegation of criminal trespassing.[100]

No precise accounting of residential trespass affidavit programs exists, but many cities use them, including locations like Vidor, Texas;[101] Chicago, Illinois;[102] and Tampa, Florida.[103] By far, though, the most prominent example was the Trespass Affidavit Program in New York City.[104] Initially started in the 1990s to combat drug sales, private landlords gave the NYPD permission to patrol the common areas of their buildings for drug crimes.[105] The program was later expanded to include a wide array of criminal and quality of life offenses.[106] At its height, an estimated 8,000 buildings in New York City were enrolled, with 3,000 of those in the Bronx alone.[107] In fact, "[i]n some neighborhoods in [New York City], nearly every private apartment building was enrolled in the program."[108]

Although invited guests were not supposed to be arrested under the Trespass Affidavit Program, they often were. In practice, these programs functionally enable police to "stop, arrest, and search everyone they encounter" in the private residential buildings that have signed onto the program. In *Ligon v. City of New York*, the judge heard how numerous invited guests were arrested under the program, including "a young Bronx man [who] was illegally stopped when he, his cousin, and a friend approached his grandmother's building and 'knocked loudly' because they didn't have a key";[109] and another plaintiff who was arrested for no apparent reason standing outside his fiancé's building.[110] The judge was initially incredulous that such encounters were possible, noting that "[f]or those of us who do not fear being stopped as we approach or leave our own homes or those of our friends and families, it is difficult to believe that

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100 *See* Karteron, *supra* note 98, at 683.

101 *See, e.g.*, *Criminal Trespass Affidavit Program*, CITY OF VIDOR, cityofvidor.com/criminal-trespass-affidavit-program (last visited Feb. 21, 2021).

102 *See, e.g.*, CHI. POLICE DEP'T, TRESPASS AFFIDAVIT PROGRAM (2015), http://directives.chicagopolice.org/CPDSergeantsExam_2019/directives/data/a7a56d8d-1542a37f-6d815-42a5-57c9966c03f221dd.html?ownapi=1#:~:text=The%20Trespass%20Affidavit%20Program%20is,areas%20of%20privately%20owned%20buildings.

103 *See, e.g.*, *Trespass Affidavit Program*, CITY OF TAMPA, tampagov.net/police/programs/trespass-affidavit-program (last visited Feb. 21, 2021).

104 Karteron, *supra* note 98, at 683.

105 Karteron, *supra* note 98, at 683.

106 *Id.*

107 Ligon v. City of New York, 925 F. Supp. 2d 478, 517 n.276 (S.D.N.Y. 2013).

108 Deborah Archer, *Exile from Main Street*, 55 HARV. C.R.-C.L. L. REV. 789 (2020).

109 Karteron, *supra* note 98, at 718 (citing *Ligon*, 925 F. Supp. 2d at 504, 526 n.346).

110 *Ligon*, 925 F. Supp. 2d at 498.

residents of one of our boroughs live under such a threat."[111] Nevertheless, the judge concluded that "[i]n light of the evidence presented at the hearing," she was "compelled to conclude that this was the case."[112]

2. *Invited Guests in Private Rental Homes*

Although trespass affidavit programs did end up resulting in the arrest of invited guests, those programs never claimed that landlords could override a tenant invitation. Indeed, the District Attorney declined to prosecute many residential trespass affidavit cases specifically on the basis that the arrestees were invited guests and thus necessarily not trespassers. In other words, even though many invited guests *were* arrested—and significant harms flowed from that—as the district attorneys made clear, there was no legal basis to charge invited guests with trespass under these Trespass Affidavit Programs, and the program was never meant to assert otherwise.[113]

However, many recent municipal laws and policies now *do* provide grounds for a specifically invited guest to be charged with trespass. Following public housing's capacious trespass exclusion, these new laws and policies grant landlords an explicit right to exclude invited guests. In other words, when a tenant has invited a guest to the premises, but the landlord—or the police, if they have partnered with the landlord—do not want that guest on the property, the landlord's wishes will override that of the tenant and the guest can be arrested and charged with trespass.[114]

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111 *Id.* at 486.

112 *Id.*

113 A typical decision declining to prosecute: "On January 5, 2011, the defendants were observed exiting a [C]lean [H]alls building. The defendants stated that they were there to visit a tenant in the building. After being arrested[,] a tenant from the building did corroborate the defendant[s'] statements[,] and the tenant stated that both defendants were in the building as his guests. Therefore, the People are declining to prosecute this case at this time." *Id.* at 495. Albany's Trespass Affidavit Program also does not purport to allow landlords to trespass invited guests, acknowledging on their templated sign: "No Trespassing[—]This building is for tenants and their guests only," and the explanation of the program states the signs "allow police officers to make basic inquiries of any persons loitering on or around that premises, including the stoop or stairs attached thereto. If any of those people . . . are family of those living at the residence or are guests of those living at the residence[,] then the officers will not ask that those persons leave." *Trespass Affidavit Program*, ALBANY CNTY. DIST. ATT'Y'S OFF., https://albanycountyda.com/Bureaus/StreetCrimesUnit/Initiatives/SafeHomesSafeStreets/TAP.aspx#:~:text=The%20Trespass%20Affidavit%20Program%20is,be%20included%20in%20the%20program (last visited Feb. 21, 2021). While the evidence in *Ligon v. City of New York* suggests that it is unlikely that the officers will faithfully adhere to this limitation, and previous trespass affidavit programs have resulted in the unconstitutional arrests of a stunning number of invited guests, those programs still purport to pay lip service to the traditional idea that invited guests cannot simply be removed at the behest of a landlord. 925 F. Supp. 2d at 484–85.

114 *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1378 ("A person who knowingly remains on the premises without the permission of the tenant or the landlord may be removed by a law enforcement officer at the request of the tenant or the landlord who is entitled to possession of the premises.").

This new landlord power to exclude contradicts the long-held common law position that a tenant's right of invitation controls.[115] Traditionally, courts held that "a person on leased premises at the express invitation of the tenant is not a trespasser as a matter of law."[116] Indeed, many state criminal codes explicitly excluded invited guests from the definition of potential trespassers as well.[117] This is because the tenant typically has the prerogative to decide who can or cannot visit.[118] Courts have frequently held that "the tenant enjoys the final word on who may come onto the premises," such that when a landlord and tenant disagree, the tenant can exercise this right "regardless of the landlord's objections."[119]

Now, though, through three main mechanisms, this traditional position has been upended, and it is landlords who have been given "the final word."[120] This new landlord power has arrived through three main mechanisms: (1) case law, (2) state legislation and local ordinances, and (3) ad hoc initiatives.

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[115] Many courts have affirmed that invited guests cannot be trespassers. *See, e.g.*, FREDERIC WHITE, OHIO LANDLORD TENANT LAW § 2:8 (2019) ("Ohio courts have held that an individual invited onto rental property by a tenant cannot be guilty of trespassing on the owner's premises even if the owner expressly instructed the individual not to come onto the property."); *see also* State v. Lawson, 7 S.E. 905, 905 (N.C. 1888) (holding that a guest who had been personally banned by the landlord but expressly invited by a new tenant was not a trespasser); L.D.L. v. State, 569 So. 2d 1310, 1312–13 (Fla. Dist. Ct. App. 1990). This rule is consistent with other well-established rules, like it is "the tenant, not the landlord" who "is the party entitled to give or to withhold consent to search," and "the landlord may be prosecuted for trespassing on the tenant's leasehold." Jeff Welty, *Landlord, Tenants, and Trespassers*, N.C. CRIM. L.: UNC SCH. GOV'T BLOG (Dec. 30, 2009, 7:32 AM), https://nccriminallaw.sog.unc.edu/landlords-tenants-and-trespassers/comment-page-1/.

[116] City of Quincy v. Daniels, 615 N.E.2d 839, 842 (Ill. App. Ct. 1993).

[117] *Id.* ("[S]ection 21-3(c) of the [Illinois] Criminal Code of 1961 . . . states that a charge of criminal trespass . . . does not apply to anyone living on land by occupancy, leasing, or other agreement with the owner, nor to anyone invited by such a person to visit him at the place he is leasing.").

[118] Katie Bement, *Tenant Guest and Trespass Rules*, EVICTION DEF., http://evictiondefense.pbworks.com/w/page/8069590/22%3A%20Tenant%20guest%20and%20trespass%20rules (last visited Feb. 21, 2021) (citing State v. Hoyt, 304 N.W.2d 884 (Minn. 1981); State v. Holiday, 585 N.W.2d 68 (Minn. Ct. App. 1998) (holding that trespass from one public housing complex could not be applied to other complexes)). The landlord, though, can often exercise qualified rights of exclusion. For instance, landlord-tenant leases often employ terms which indirectly impact this tenant prerogative, like limiting the number of days in a month any one individual can spend the night. *See* Allison Rebecca Penn, *Guest or Tenant? How to Create and Enforce Your Guest Policy*, ALL PROP. MGMT. (Apr. 16, 2019), https://www.allpropertymanagement.com/blog/post/create-and-enforce-your-tenant-guest-policy/#:~:text=Most%20landlords%20allow%20guests%20to,will%20increase%20as%20a%20result. But, subject to those exceptions, courts have upheld that a crucial part of tenancy (and indeed a crucial part of the right of privacy) is the right to entertain the guests of one's choosing. *See* Bement, *supra*.

[119] Nat'l Hous. L. Project, *No-Trespass Policies:* Hicks *and Its Aftermath*, 34 HOUS. L. BULL. 129, 131 (2004) (citation omitted). Many cases focused on whether, if a landlord could not bar a visitor from a tenant's apartment, the landlord could nevertheless bar the visitor from any apartment common areas. The common law position was that a landlord could not bar an invited guest from the common area necessary to access the tenant's apartment. State v. Dixon, 725 A.2d 920, 922 (Vt. 1999); City of Bremerton v. Widell, 51 P.3d 733, 738 (Wash. 2002), *cert. denied*, 537 U.S. 1007 (2002).

[120] *See* Nat'l Hous. L. Project, *supra* note 119.

a. Case Law

Although a tenant's traditional common law right of exclusion is clear, many courts have suggested that a landlord could potentially gain the power to exclude by simply putting a clause in the landlord-tenant lease.[121] In the early 1990s, this issue came before the Illinois Supreme Court in *Williams v. Nagel*.[122] In *Williams*, a group of plaintiffs were charged with criminal trespass after revisiting—at a guest's invitation—a housing complex owned by a private corporate landlord, which, although private, received federal funds and abided by the office of Housing and Urban Development's regulations.[123] The landlord-tenant lease declared that "[m]anagement has the right to bar individuals from the property," and the court upheld this clause and held that it overrode any invitation by the tenant.[124] Although the private landlord in this case had a public aspect—in that the corporation was receiving public funding—in the aftermath of *Williams*, the decision was widely understood to apply to all private landlords, and to have given them "sweeping new powers to keep out visitors and file trespassing charges against even the relatives of tenants if the landlord deems them to be troublemakers."[125]

b. State Legislation and Local Ordinances

Some states have gone further than just permitting landlords to gain exclusionary powers through lease terms and have offered landlords that power through legislation. In fact, in 2010, the Illinois legislature codified the *Williams v. Nagel* decision in the Illinois Code of Civil Procedure.[126] Section 9-106.2(f) declares that a "landlord shall have the power to bar the presence of a person from the premises owned by the landlord who is not a tenant or lessee or who is not a member of the tenant's or lessee's household."[127]

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121 For example, in *State v. Lawson*, the court suggested that if an enhanced right to exclude were contained in the lease itself, the landlord's right to exclude could become superior to the tenant's right to invite. 7 S.E. 905, 905 (N.C. 1888); Welty, *supra* note 115.

122 643 N.E.2d 816 (Ill. 1994).

123 *Id.* at 817.

124 *Id.* at 822.

125 Tom Pelton, *Landlords Win Right to Bar Visitors*, CHI. TRIB. (Nov. 14, 1994), http://www.chicagotribune.com/news/ct-xpm-1994-11-14-9411140265-story.html. In 2000, the court in *Wright v. Bogs Management Inc.* noted that "No court-either federal or Illinois-has since explained the boundaries of or distinguished this [*Williams v. Nagel*] holding." No. 98 C 2788, 2000 WL 17740086, at *15 (N.D. Ill. 2000).

126 *See* Anderson-Bey v. Martin, No. 110311-U, 2012 WL 6967271, at *2 (Ill. App. Ct. May 17, 2012).

127 735 ILL. COMP. STAT. 5/9-106.1(f) (West 2010). The court noted that this "appears to be merely a codification of existing law," since "courts have uniformly upheld the rights of landlords-including public housing authorities -to ban nonresidents from their premises." *Anderson-Bey*, 2012 WL 6967271, at *2–*3 n.2. According to the Nichols Illinois Civil Practice, the section means that "[a] landlord does have the authority,

Recent legislation has also conferred this same banishment power in other jurisdictions. In 2015, "without debate," Arizona passed A.R.S. § 33-1378, which gives landlords the authority to have guests removed, regardless of the tenant's wishes.[128] The ostensible justification for the legislation in Arizona was to remedy situations where guests move in and refuse to leave.[129] However, as critics noted, multiple remedies were already available to address that scenario.[130] Moreover, on its face, the legislation extends far beyond unwanted and overstaying guests, and authorizes landlords to decide "a boyfriend or even a dinner guest [is] not welcome" and thus subject to removal.[131] In essence, A.R.S. § 33-1378 seems to "effectively permit your landlord to call the police on anyone he sees walking into your apartment whom he doesn't like."[132] In fact, the state senator who sponsored the bill, Senator Gail Griffin, confirmed that the law did actually allow landlords "to kick guests out at will," and that "[a] landlord could call the police even if the tenant wants the guest to stay."[133]

Additionally, some municipalities have *mandated* that landlord-tenant leases must include terms giving landlords this enhanced exclusionary power. In Dekalb, Illinois, the Dekalb Municipal Code mandates that all landlord-tenant leases after 2013 must include a provision authorizing a landlord "to ban tenant guests whose conduct is prohibited by the Crime Free Housing Lease Addendum."[134] The conduct prohibited by the Crime Free Housing Addendum

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under the Forcible Entry and Detainer Act, to bar persons other than tenants or members of a tenant's household from the premises by a notice, which also states that if the tenant invites the barred person onto any portion of the premises, then the landlord may treat this as a breach of the lease, whether or not this provision is contained in the lease, and the landlord may evict the tenant in accordance with the provisions described above." 7 NICHOLS ILL. CIV. PRAC. § 124:35 (2012).

128 *See* Howard Fischer, *Arizona Bill Lets Landlords Evict Tenant's Guests*, TUCSON (Aug. 11, 2015), https://tucson.com/news/arizona-bill-lets-landlords-evict-tenants-guests/article_1b96682e-c4b4-5830-a8c5-c9198e7acd48.html.

129 *See id.*

130 *Id.*

131 When discussing the merits and drawbacks of the Arizona legislature, one reporter begins her story with: "Say you're in a relationship, and things are going well. Your boyfriend is staying night after night until, before you know it, he's pretty much moved in. Life is bliss, except for one thing. Your landlord doesn't like Prince Charming . . . . Senate Bill 1185 . . . would give landlords the power to remove anyone from their property who is not named in a written lease." Elizabeth Stuart, *Arizona Legislation Would Empower Landlords to Boot Guest*, PHX. NEW TIMES (March 30, 2015, 7:30 AM), https://www.phoenixnewtimes.com/news/arizona-legislation-would-empower-landlords-to-boot-guests-6627554.

132 Ken Volk, *A.R.S. § 33-1378 Allows Landlords to Remove Roommates Without Going to Court*, ARIZ. TENANTS ADVOCS. (n.d.), https://www.arizonatenants.com/help-article/ars-ss-33-1378-allows-landlords-to-remove-roommates-without-going-to-court.

133 Stuart, *supra* note 131.

134 City of Dekalb, Illinois, Municipal Code § 10.10(d).

is all "unlawful activity," a broad term that encompasses everything from violating a municipal no smoking ordinance to committing violent crime.[135]

Further, the DeKalb Municipal Code also specifically authorizes the police to enter into trespass agreements with landlords, and specifically authorizes landlords to have a power to exclude that overrides that of the tenant. The Code empowers landlords "to provide the City with a 'Banned List' identifying persons who have been prohibited from entering upon specified properties" and provides that "[t]he owner or property manager's decision to include a person on the banned list shall supersede any contrary direction from any tenant or lessee."[136] These same lease terms are also mandatory in Freepoint, Illinois, again as part of the Crime Free Multi-Housing Program,[137] and Riverdale City, Utah, also has a similar program.[138]

c. Ad Hoc Local Initiatives

Even when state legislation and local ordinances do not bestow unfettered exclusionary powers upon landlords, some landlords are privately partnering with police departments to accomplish the same exclusionary goals. Without any relevant lease term or specific authorization, landlords are simply adopting policies that let them label invited guests as trespassers, and then seeking enforcement of state trespass statutes against those guests, with which the police comply.[139] This is increasingly common in cities and towns in Michigan.[140] Also, in Madison, Wisconsin, the police department encourages landlords to partner with them on no visitor policies.[141] The police department requests that landlords erect a "No Trespassing" sign, which the police department believes

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135 *Id.* § 10.10(c).

136 *Id.* § 10.20(b).

137 City of Freeport, Ill., Ordinances ch. 876, § 876.06 (2013).

138 David Y. Hansen & James Ebert, *The Crime Free Multi-Housing Program: Keeping Illegal Activity Off Rental Property*, RIVERDALE CITY (Apr. 20, 2005), http://www.riverdalecity.com/departments/public_safety/police/Forms/Multihousing.pdf.

139 Some courts have held that a police officer who stops a person for purposes of issuing a trespass warning on behalf of a property owner, is considered a "consensual encounter." Rodriguez v. State, 29 So. 3d 310, 311 (Fla. Dist. Ct. App. 2009). Therefore, failure to provide accurate identification during such a stop would not be an arrestable offense. *Id.* at 313; *see also* Gestewitz v. State, 34 So. 3d 832, 834 (Fla. Dist. Ct. App. 2010) ("A detention for the purpose of issuing a trespass warning on behalf of a private owner—absent other circumstances giving rise to a reasonable suspicion of other criminal activity—is a consensual encounter."); S. LEGAL COUNS., *supra* note 44, at 49 ("A person can be banned from public places for virtually any reason.").

140 *See, e.g.*, Schaafsma, *supra* note 23.

141 Becker, *supra* note 24.

then empowers officers to "declare any non-resident [including an invited guest] on the property to be trespassing."[142]

While obviously not an authoritative source, a relevant discussion on a police internet forum also shows the uptick in trespass exclusions from rented premises, at the behest of the landlord and over the protestations of the tenant.[143] One officer writes:

> We are often called to apartment complexes owned by private companies or individuals and are asked by the owner/manager to issue "trespass notices" to people they do not want to return to the property. It is a given that persons who are on a lease cannot be placed on notice since we have evictions process [sic] that needs to be followed by owner/manager, but . . . what about people that are invited guests of leaseholders?[144]

The author goes on to note: "The attitude of my command staff is 'if the property owner/manager requests a trespass notice, then we do one.'"[145] The officer worries, "I see liability if we put someone on notice that could be [] an invited guest that has a right . . . to visit a leaseholder," and says the "closest" legal answer they can find is in the public housing context.[146]

The responses to this officer's concerns essentially range from "do what your commanding officer tells you,"[147] to a middle ground of it is "best to consult with the city attorney,"[148] to, in essence, "you absolutely cannot do this."[149] One responder declares that in Vermont, "a trespass charge cannot be made by a landlord on the legal resident nor someone invited by the resident . . . to visit."[150]

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[142] *Id.*

[143] @SC Detective, *Trespassing at an Apartment Complex/Legal Issue*, OFFICER.COM (Mar. 18, 2011, 9:19 PM), https://forum.officer.com/forum/officers-and-law-enforcement-professionals-only/the-squad-room/166357-trespassing-at-an-apartment-complex-legal-issue.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *See* @Iowa #1603, Comment to *Trespassing at an Apartment Complex/Legal Issue*, OFFICER.COM (Mar. 19, 2011, 6:23 AM), https://forum.officer.com/forum/officers-and-law-enforcement-professionals-only/the-squad-room/166357-trespassing-at-an-apartment-complex-legal-issue (stating that one's commanding officer is "all the direction [one] need[s]").

[148] *See* @HI629, Comment to *Trespassing at an Apartment Complex/Legal Issue*, OFFICER.COM (Mar. 18, 2011, 10:33 PM), https://forum.officer.com/forum/officers-and-law-enforcement-professionals-only/the-squad-room/166357-trespassing-at-an-apartment-complex-legal-issue (suggesting the author "[g]et a 'legal opinion' from your city attorney or state attorney").

[149] @DeputySC, Comment to *Trespassing at an Apartment Complex/Legal Issue*, OFFICER.COM (Mar. 18, 2011, 11:16 PM), https://forum.officer.com/forum/officers-and-law-enforcement-professionals-only/the-squad-room/166357-trespassing-at-an-apartment-complex-legal-issue.

[150] @WHC166, Comment to *Trespassing at an Apartment Complex/Legal Issue*, OFFICER.COM (Mar. 18,

Another notes that "if a resident is allowing someone to come in their apartment as a guest then its [sic] not trespassing."[151] In contrast, a different responder says, "We trespass (and arrest) invited guests off private property all of the time."[152] Another ventures, "I would think in [South Carolina] that you would not be able to trespass someone who is a resident or the guest of a legal residence [sic], I would refuse[] to issue one without legal opinion."[153]

An officer responding from Florida explains how their police department has dealt with the situation in the context of public housing:

> Florida law allows someone leasing property, be it an apartment or house, to have visitors. Case law has dictated that if someone is trespassed from a property, that trespass warning is null and void if they are allowed back on property by an authorized person. A resident is an authorized person. . . . What we did to combat this was to change our written trespass warning. There is a section on it that says a resident is not authorized to overrule the trespass warning and notices went out to everyone in public housing explaining this. If we find the person back on the property and they say that they are an invited guest of a resident, we check with the resident. If the resident doesn't want to claim them, they go to jail. If the resident does want to claim them, the housing authority gets notified and the resident is promptly evicted. We have been instructed not to make arrests if the resident claims that the person is an invited guest due to the legal precedents.[154]

This online conversation among police officers highlights some of the issues that arise with ad hoc banning, including the confusion surrounding the legality of the practice, a lack of uniformity between jurisdictions regarding enforcement of exclusions, and a commitment on the part of landlords and police to sometimes engage in the practice, regardless of the legal issues.

2011, 9:48 PM), https://forum.officer.com/forum/officers-and-law-enforcement-professionals-only/the-squad-room/166357-trespassing-at-an-apartment-complex-legal-issue.

[151] @DeputySC, *supra* note 149.

[152] @just joe, Comment to *Trespassing at an Apartment Complex/Legal Issue*, OFFICER.COM (Mar. 18, 2011, 11:56 PM), https://forum.officer.com/forum/officers-and-law-enforcement-professionals-only/the-squad-room/166357-trespassing-at-an-apartment-complex-legal-issue.

[153] @Magic Matt, Comment to *Trespassing at an Apartment Complex/Legal Issue*, OFFICER.COM (Mar. 18, 2011, 11:58 PM), https://forum.officer.com/forum/officers-and-law-enforcement-professionals-only/the-squad-room/166357-trespassing-at-an-apartment-complex-legal-issue.

[154] @Delta_V, Comment to *Trespassing at an Apartment Complex/Legal Issue*, OFFICER.COM (Mar. 20, 2011, 1:40 PM), https://forum.officer.com/forum/officers-and-law-enforcement-professionals-only/the-squad-room/166357-trespassing-at-an-apartment-complex-legal-issue.

II. PROBLEMS WITH BRINGING BANNING HOME

Banning and exclusion mechanisms raise concerns when they occur in any context, but their importation into private rental homes is particularly troubling. First, the cumulative impact of adding rented homes to the ever-growing list of exclusionary zones means that almost all spaces in a city are now, at least theoretically, potentially off-limits and unavailable to particular people. With the addition of rental homes, nearly every conceivable kind of city space is now a zone subject to state-driven exclusion and banning.[155] For those whose ability to move through town and city spaces is often impeded and questioned, the clear message is that there is almost nowhere one can rest free from the reach of banning.[156]

The second problem is the symbolic significance of this particular site of banning: the home. Homes occupy a unique and revered place in the American cultural and legal imagination, as the last bastion of refuge from the outside world and the ever-encroaching state.[157] Removing control of this space from tenants, so that their desired visitors may no longer come, hollows out this notion of home, rendering that space, too, subject to spatial governance.[158]

The third issue is that this exclusionary expansion simply gives too much discretion to landlords and police. In the other contexts of exclusion and banning, this discretion has been exercised in demonstrably racially discriminatory ways.[159] There are good reasons to believe race discrimination will also be at issue in this home context.

Fourthly, and relatedly, because of the demographics of both renter and landlord populations, these exclusionary laws reify existing social hierarchies, giving even more power to already powerful groups.[160] Finally, these exclusion laws weaken social and familial bonds, infringe on privacy rights, and lead to the on-the-ground negative consequences of eviction for renters and arrest for visitors.

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155 BECKETT & HERBERT, *supra* note 5, at 76.

156 *See* Beckett & Herbert, *supra* note 2, at 24.

157 Suk, *supra* note 97, at 23–24.

158 Jeannie Suk also observed this trend in the context of domestic violence. *Id.* at 52.

159 *See* BECKETT & HERBERT, *supra* note 5, at 13 (discussing the ways vagrancy laws have been used to discriminate against minorities).

160 *See* Swan, *supra* note 97, at 873–74 (outlining the differing demographics of homeowners versus renters).

A. Cumulative Impact

The first problem with bringing banning home is its cumulative impact. Exclusionary zones reproduce and multiply: when they exist in one area, other areas soon start adopting the same logic, in part to not get saddled with undesirable people themselves.[161] This expansionary logic leads to a reality in which "many of those who spend time in public spaces are barred from an increasing number of urban places . . . [and] encounter an often dizzying array of invisible legal barriers that impede their mobility."[162] As homes join the "increasing swaths of urban space [that] are delimited as zones of exclusion from which the undesirable are banned,"[163] the areas that people can consider themselves able to freely occupy become almost nonexistent. Impacted individuals are functionally expelled from the polis and community in its entirety, and the message of their "undesirability" is totalizing and complete. Nearly the entire city—with the exception of owner-occupied homes—becomes potentially subject to the spatial governance overseen by the state.[164]

B. The Special Significance of Home

The second main problem concerns the cultural and psychic significance of the concept of home.[165] The idea of "home" occupies a revered place in the American psyche, as a "sacred, inviolate" space[166] into which literal and metaphorical intrusions are justified only for profoundly compelling reasons.[167] This vision of home as a special space has been "embedded in our traditions since the origins of the Republic,"[168] and the idea that home serves as "the metaphorical boundary between private and public spheres"—sheltering the private within and keeping the public outside—has quite staunchly endured since then.[169] The privacy or "sanctity" of the home is recognized and protected in much constitutional jurisprudence, particularly in Fourth Amendment

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161 Beckett & Herbert, *supra* note 2, at 7–8.

162 BECKETT & HERBERT, *supra* note 5, at 15.

163 *Id.*

164 *See id.* at 11 ("The punitive city of twenty-first-century America is one in which an increasing number of acts are regulated and criminalized; the state's ability to search, detain, regulate, and monitor is expanded; and a system of invisible yet highly consequential gates and barriers increasingly constrains the movement of some urbanites in public space.").

165 For a similar discussion of the significance of home, see Swan, *supra* note 97, at 850–51.

166 See Suk, *supra* note 97, at 23 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *227).

167 *Id.* One such reason is domestic violence. For a discussion of protection orders as a banning practice, see SUK, *supra* note 28.

168 Payton v. New York, 445 U.S. 573, 601 (1980).

169 SUK, *supra* note 28, at 3.

cases.[170] In that context, the Supreme Court has affirmed that homes are to be protected from excessive government oversight and that the State is not to be "omnipresent in the home."[171]

While the privilege of privacy has often had less political potency when applied to housing that has a "public dimension"[172]—like the federal housing projects described earlier—private[173] rental housing has still traditionally enjoyed fairly high levels of privacy. Even landlords themselves may not enter the property except in limited circumstances.[174] As the court in *Zallner v. State* wrote, "when the tenant enters into possession under a lease, the landlord . . . parts with his right of control over the same . . . [and] has no more right to enter upon the premises . . . than a stranger."[175] Instead, the tenant "is invested with all the right of control over the premises that the landlord himself would possess . . . and no right of entry [on the landlord's] part is implied for any purpose, unless specifically reserved."[176]

Nevertheless, with the "rise of techniques of control in the policing of public space," even the home could not remain immune for long.[177] But exclusions in the home context take on a special salience: being subject to state-driven exclusion powers in the public space of a park is one thing, but being subject to state-driven exclusion power on the doorstep of a friend or family member's home exacerbates the psychic and dignitary impacts associated with exclusion in all of its many of its forms.[178]

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170 *See* Swan, *supra* note 97, at 851.

171 *See id.* (citation omitted).

172 *See id.* at 852.

173 "The one-strike policy in federal housing is a good example of homes being understood as open to public scrutiny and control. Initially, the burden of deterring the criminality of others was placed only on those with homes in federal housing projects, which are thus somehow 'public.' 'For those deemed eligible to live in public housing,' the ability to remain in residence there depended 'upon [their] adherence to stricter rules and regulations' than those applied to more 'private' homes." *Id.* (citation omitted).

174 George Roland, *The Criminal Trespass Problem*, GEORGE ROLAND (June 24, 2014), https://www.georgeroland.com/the-criminal-trespass-problem (citing Zallner v. State, 15 Tex. App. 23, 24–25 (Tex. Ct. App. 1883)).

175 *Zallner*, 15 Tex. App. at 25.

176 *Id.*

177 Suk, *supra* note 97, at 69. As she writes in the context of domestic violence: intervention into the home "relies on a rhetoric of publicness to envision the home as in need of public control, like the streets. . . . Contextualizing criminal law control of the home alongside control-oriented approaches to crime in public space reveals a criminal justice trend that bridges the street and the home. The home, the archetype of private space, becomes a site of intense public investment, suitable not only for the enforcement of crime within it[,] but also for criminal law control." SUK, *supra* note 28, at 11.

178 *See* Swan, *supra* note 97, at 858 (describing the profound social effects of exclusion measures applied in a home context).

C. Discretion and Discrimination

When landlords have unfettered rights of exclusion over a rented property, they have inordinate power over a tenant's private and social life.[179] When a landlord can freely infringe on a tenant's right to have guests, it magnifies the reality that "[t]he possession of property, owned or leased, is more than an issue of shelter–it is a defining element of our lives."[180] Scholars have noted that "[p]roperty ownership influences the way we feel about ourselves as well as how we are perceived by those around us," and in this case, it influences the right to interact with other people, and to enjoy the privacy and associational rights that are usually associated with the home.[181] "[P]roperty divides us into a world of haves and have-nots, determining people's social position on the basis of a single factor."[182] Those who live in homes they own can freely choose the company they keep; those who live in rented homes now, in many jurisdictions, seemingly cannot.

Giving landlords special exclusionary powers provides more power to an already politically powerful group, while decreasing the political and social power of groups that have traditionally had less.[183] Socioeconomic, gender, and racial divides often separate home renters from homeowners and landlords.[184] "[R]acial minorities, women, and the disabled are more likely to live in rental housing."[185] In 2019, for instance, only 40.6% of Black households owned homes, compared to 73.1% of white households.[186] To take Illinois—a hotbed of expanding landlord exclusionary power—as a more localized example, "59.1% of African-American households, 47.4% of Hispanic households, and 38.3% of Asian households rent."[187] In contrast, only 25% of "non-Hispanic

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[179] It is important to note that some landlords may not even want this power and may be coerced into exercising it. When police partner with private landlords and encourage them to exercise and delegate this exclusionary power, they often do so from within regulatory regimes that threaten landlords if they do not comply. *See* LORRAINE MAZEROLLE & JANET RANSLEY, THIRD PARTY POLICING 45–46 (2005).

[180] Mandara Meyers, *(Un)Equal Protection for the Poor: Exclusionary Zoning and the Need for Stricter Scrutiny*, 6 U. PA. J. CONST. L. 349, 349 (2003).

[181] *Id.*

[182] *Id.*

[183] Further, the lower a person is on the socioeconomic ladder, the less ability they have to simply avoid a banning clause by choosing to rent a different property.

[184] Swan, *supra* note 97, at 873.

[185] *Id.* at 873–74.

[186] Prashant Gopal, *Black Homeownership Falls to Record Low as Affordability Worsens*, BLOOMBERG (July 25, 2019, 12:34 PM), https://www.bloomberg.com/news/articles/2019-07-25/black-homeownership-falls-to-record-low-as-affordability-worsens.

[187] Swan, *supra* note 97, at 874 (citing EMILY WERTH & SARGENT SHRIVER, THE COST OF BEING "CRIME FREE": LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 5 n.13 (2013)).

white households" do.[188] In Madison, Wisconsin—another site of enhanced landlord exclusionary powers—"81 percent of [B]lack [householders] and 71 percent of Latino [householders]" rent, compared to 46% of white householders.[189] This coincides with Madison's income disparity: "per capita, white residents of Madison earned $36,194 in 2014, more than twice as much as Black residents, who earned $16,179, and Latino residents, who earned $15,631."[190] In terms of gender, nationally, "[f]emale-headed households are more than twice as likely to rent as the general population."[191] And, on the axis of disability, "41.8% of households with a nonelderly person with a disability rent, as compared to just 31.6% of households that rent overall."[192] Thus, renters are much more likely to come within one or more of the sometimes overlapping categories of low-income, people of color, women, and the disabled.

People of color have historically not fared well under banning laws. In all of their manifestations, from banning people from city parks to trespass affidavit programs in private apartment buildings, exclusionary laws have been applied in demonstrably racially discriminatory ways. Exclusion from particular spaces has historically been "a primary vehicle for racial discrimination against people of color,"[193] and like the vagrancy laws before them, contemporary exclusionary laws "allow[] police to arrest people for 'suspicious behavior,'" thereby "open[ing] the door for officers to reinforce stereotypes against people they believe[] were generally suspicious."[194]

In the public spaces of parks, an estimated 9,000 to 10,000 exclusion orders were issued in Seattle in 2005.[195] Of those, 45% were issued to people of color, with 38.4% of those issued to Black visitors, even though only 8% of the Seattle population is Black.[196] Specifics on the race of the recipients of SODA orders is not available, but given that Black individuals are "substantially overrepresented

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188 *Id.*

189 Becker, *supra* note 24.

190 Letter from Rachel Goodman, Staff Att'y, ACLU Racial Just. Program, and Karyn Rotker, Senior Staff Att'y, ACLU of Wisconsin, to Michael C. Koval, Chief of Police, City of Madison Police Dep't 4 (May 16, 2016) (available at https://bloximages.chicago2.vip.townnews.com/madison.com/content/tncms/assets/v3/editorial/4/f9/4f974243-3800-5872-b3f8-7f0d7c5cfdc0/573f0134659f5.pdf.pdf).

191 Swan, *supra* note 97, at 874.

192 *Id.* (citation omitted).

193 Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 407 (2010).

194 Jocelyn L. Santo, *Down on the Corner: An Analysis of Gang-Related Antiloitering Laws*, 22 CARDOZO L. REV. 269, 281 (2000); *see* Jordan Berns, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717, 718 (1989).

195 Beckett & Herbert, supra note 2, at 24 n.4.

196 BECKETT & HERBERT, *supra* note 5, at 48, 67.

among Seattle drug arrestees," it is reasonable to expect that they are "similarly overrepresented among recipients of SODA orders."[197]

Public-private spaces are also home to racialized banning practices. In Seattle, "the share of trespass admonishments that are issued to [B]lacks and Native Americans is five and six times greater, respectively, than the share of the population that is [B]lack or Native American."[198] Under the trespass initiative in Grand Rapids, Michigan, "African Americans [were] stopped at more than twice the rate [of] whites."[199] And in Miami Gardens, Florida, a single "African-American man was stopped more than 250 times for suspected trespassing on the property of the convenience store where he worked," and he was arrested over sixty times as a result of those stops.[200]

The public-private space of public housing continues this pattern.[201] In the study showing that 2,310 individuals were banned from a particular Dayton housing project in a five-year period, "eighty-nine percent . . . were male, and most, if not all, were [B]lack."[202] Indeed, the Baltimore Police Department's "template for processing trespassing arrests in public housing" exemplifies the racialized nature of banning in public housing.[203] The template contained a section to insert the arrestee's demographic information.[204] That section was "pre-filled with the words '[B]lack male.'"[205]

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197 *Id.* at 69.

198 *Id.* at 67–68. The Native American share of issued park exclusion notices is more than ten times its share of the Seattle population. *Id.* at 67. 14.8% of park exclusion orders were issued to homeless people. *Id.* at 66. "Hispanics, Asians, and whites appear to be underrepresented among the banished relative to the general population." *Id.* at 68.

199 *ACLU Commends Grand Rapids Police Decision to End Trespass Policy That Led to Disproportionate Arrest of African-Americans*, ACLU (June 29, 2017), https://www.aclu.org/press-releases/aclu-commends-grand-rapids-police-decision-end-trespass-policy-led-disproportionate. Grand Rapids agreed to stop its trespass practices in 2017 following a legal challenge from the ACLU, and a Michigan Court of Appeal ruling that a similar practice in a different municipality was unconstitutional. *Id.*

200 Williamson, *supra* note 17.

201 For example, "[i]n 1991, the residents at St. Michaels Housing Authority (SMHA) in St. Michaels, Maryland, joined to challenge several management policies, including the maintenance of a criminal trespass (banning) list. In their class action complaint, the plaintiffs alleged, *inter alia*, racial disparity. Of the forty people banned from the property, at least thirty-eight were black. Only about sixty-four percent of the residents living at SMHA were minorities, but approximately eighty-five percent of the residents whose families were affected by the list were [B]lack." O'Leary, *supra* note 82, at 147. Private trespass affidavit programs also showed a correlation between banning and race. Most trespass affidavit programs are in buildings with a high percentage of people of color. Karteron, *supra* note 98, at 673.

202 O'Leary, *supra* note 82, at 140.

203 Karteron, *supra* note 98, at 684.

204 *Id.*

205 *Id.* (citing U.S. DEP'T OF JUSTICE, CIV. RTS. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 37 (2016)). Trespass authority and ban lists in public housing are also bolstered by substantive criminal law which specifically criminalizes trespassing on public housing premises. *Id.*

These patterns, with race being a major element in each of the other banning practices, suggest that racial discrimination will also be a factor in landlord exclusionary practices. While it is difficult to get empirical data on private landlord banning practices, anecdotal evidence and the cultural histories of the places that have most enthusiastically embraced landlord banning give pause for concern about racial discrimination occurring in this context—both when police and landlords are partnering to exercise the exclusionary power, and when landlords are exercising it on individual fiat.[206]

A letter to the *LA Times* seeking advice about a landlord's behavior exemplifies the kinds of issues that seem likely to arise as landlords gain exclusionary powers. The author wrote:

> I am white, but I have a stepbrother who is [B]lack and we are very close. I recently moved into an apartment in a small building, and my landlord lives in the apartment across from mine.
>
> Everything was fine, but two weeks ago I had my brother over for dinner and my landlord saw him outside on the way to my apartment. She immediately became hostile and demanded that he leave.
>
> The landlord then called me and asked why I was letting "dangerous people" visit me. I told her that the visitor was my brother and that he was not dangerous.
>
> My landlord then told me that I was not allowed to have my brother over as a guest because she wanted to "keep the house safe" and did not want "dangerous people" on the property. I told her that I didn't think she could stop my brother from visiting me and reiterated that he was not dangerous in any way.
>
> The following week, I was issued a "60-Day Termination of Tenancy" notice. This doesn't seem right, but I am not sure what to do. Can you advise me?[207]

This landlord did not even have enhanced exclusionary powers, yet nevertheless evicted the tenant on the basis of her tenant's association and failure to

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[206] As scholar Cheryl Harris has suggested, "[t]he exclusion of subordinated 'others' was and remains a central part of the property interest in whiteness, and, indeed, is part of the protection that the court extends to whites' settled expectations of continued privilege." Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1758 (1993).

[207] Molly Current, *A Landlord Can't Ban Certain Visitors Because of Race*, L.A. TIMES (Jan. 21, 2017, 3:00 AM), https://www.latimes.com/business/la-fi-rentwatch-discrimination-20170121-story.html.

exclude.[208] This exemplifies the kind of arbitrary action that seems likely to happen when landlords are given wide, discretionary exclusionary powers.[209]

Also, it is perhaps not entirely coincidental that the states that have been most keen on expanding landlord exclusionary powers, including Illinois and Arizona, are states with long cultural histories of particularly egregiously racist exclusion of people of color.[210] For example, Illinois—which has been very vigorous in its exclusion expansion efforts—was once notorious for its high percentage of 'sundown' towns: towns where, for decades, Black workers could work during the day but were not allowed to remain at night.[211] Sundown town rules were enforced with violence and even lynching, and those violent, exclusionary histories still hover over some Illinois towns.[212] In fact, in 2018, a reporter discovered that some people in the small town of Anna, Illinois, will still openly explain to (white) visitors that the town's unusual name is actually an acronym, for "Ain't No N****rs Allowed."[213] The current population of Anna still speaks to that exclusionary tendency: in a town of approximately 4,000 people, 95.7% of the population is white.[214]

D. Impact on Tenants and Visitors

Landlord banning practices significantly affect the lives of both tenants and guests. Associational rights are infringed, privacy and dignity harms are inflicted, and the looming practical results of potential eviction for the tenant or arrest for the guest threaten the well-being of all involved. Both arrest and eviction have numerous collateral consequences and can trigger cascading negative effects.

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[208] *See id.* Of course, this presumes we accept the writer's account.

[209] The newspaper advice columnist responding to the query noted that the landlord's actions may have been in violation of fair housing laws. *Id.* Regardless, given the large disparities of power between landlords and tenants, fair housing laws seem like a poor tool to address the potential problems posed by enhanced exclusionary abilities. An additional problem is that even if landlords have no propensities to exercise their discretion on the basis of race, they may find themselves lobbied to do so by racist neighbors. As Priscilla Ocen writes, there is a history of neighbors finding ways to enforce racial segregation and stratification even when property owners are initially unwilling to do so. *See* Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1542, 1574 (2012).

[210] *See generally* DEBORAH N. ARCHER, YOU CAN'T GO HOME AGAIN: RACIAL EXCLUSION THROUGH CRIME-FREE HOUSING ORDINANCES (2019).

[211] Logan Jaffe, *Life in One of the Whitest Towns in America*, ATL. (Nov. 7, 2019), https://www.theatlantic.com/family/archive/2019/11/anna-illinois-sundown-towns/601111/.

[212] *Id.*

[213] *Id.*

[214] *Id.* Other towns are confronting their racist past. "In March 2015, the city council of Goshen, Indiana, voted 6-0 to pass 'A Resolution Acknowledging the Racially Exclusionary Past of Goshen, Indiana, as a 'Sundown Town.'" *Id.*

1. Associational Rights

In Arizona—which also has a long history of racial exclusion[215]—the state senator who sponsored the state statute enhancing landlords' exclusionary powers acknowledged that the statute gave landlords the power to ban guests over a tenant's objections.[216] However, the senator further declared that "she didn't believe" it would be a problem and did not think that "landlords would use the regulation against 'somebody over for Thanksgiving dinner.'"[217]

But, as renters in Texas experienced, arbitrary enforcement is almost bound to happen when landlords have vast, discretionary powers.[218] As one attorney in Denton County, Texas, wrote, describing one of two similar cases he had defended in a six-month period:

> Suppose you live in an apartment, and you invite a friend over for dinner. Your friend arrives, and you begin eating. Moments later, there is a knock at your apartment door. It is the apartment manager, and the police. They tell you that your friend was issued a trespass warning by the apartment security officer last month and is prohibited from coming to the apartment complex where you live. You demand to see the trespass warning as the police handcuff your friend and drag him from your apartment. On the warning, no reason is given for prohibiting your friend from being at the apartment complex. The police tell you that your friend has committed a criminal offense—criminal trespass—punishable by up to 180 days in jail simply by being at your apartment after the trespass warning was issued last month.[219]

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[215] Arizona is a frequent pioneer of exclusionary and racially discriminatory policies. Arizona attempted to pass a law prohibiting landlords from renting to undocumented immigrants, has a "long history of race-based voting discrimination," and has a troubled "history of race-based exclusion laws targeted at non-White persons." Jim Small, *Rent to Illegal Aliens? Landlord, You May Be Penalized*, CAMPBELL L. OBSERVER (Aug. 6, 2012), http://campbelllawobserver.com/rent-to-illegal-aliens-landlord-you-may-be-penalized/; Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1041 (9th Cir. 2020); Kristina M. Campbell, *Rising Arizona: The Legacy of the Jim Crow Southwest on Immigration Law and Policy After 100 Years of Statehood*, 24 BERKELEY LA RAZA L.J. 101, 137 (2014).

[216] Stuart, *supra* note 131.

[217] *Id.* The breadth of A.R.S § 33-1378 raises the obvious concern of discriminatory application. When passing the statute, though, lawmakers insisted that, since leases are subject to anti-discrimination laws, the Fair Housing Act and state-based anti-discrimination provisions will safeguard its application. Howard Fischer, *Arizona Bill Lets Landlords Evict Tenant's Guests*, TUCSON.COM (Apr. 2, 2015), https://tucson.com/news/arizona-bill-lets-landlords-evict-tenants-guests/article_1b96682e-c4b4-5830-a8c5-c9198e7acd48.html.

[218] Roland, *supra* note 174.

[219] *Id.*

In two Texas cases, the landlords were engaged in the ad hoc exercise of authority.[220] While the legal basis for their claim of authority to exclude was shaky at best, the incidents illustrate what exclusionary power looks like in action: literally disrupting dinner, in a private home, with an invited guest.[221]

It is not just dinner with friends that is implicated by these exclusionary powers. As a *Chicago Tribune* article on the impact of *Williams v. Nagel* explained, familial relationships are often implicated as well.[222] The article, which described the aftermath of the Illinois case that affirmed that landlords could have this enhanced exclusionary power if they put it in the lease, opened with an anecdote of a landlord and tenant locked in a months-long dispute about her inviting her noisy family members to visit.[223] The landlord was excited that the court's decision would allow him to prohibit visits from the tenant's family, including an eleven-year-old grandson, once he changed the lease term.[224] Like in the dinner guest story, there was no allegation of dangerousness or safety threats, just a dislike or distrust of the tenant's visitor.

To take advantage of their new empowerment, the article noted that landlords would be required to rewrite their lease terms to include a clause explicitly granting them exclusionary power and provide a set of written rules for guests.[225] Those rules "could be as obvious as stating that visitors cannot sell drugs or engage in illegal activities. Or they could be as picky as requirements that guests cannot smoke, talk loudly, disturb other tenants or wear ripped jeans."[226] Technically, the rules could not "discriminate by race, sex, age or disability," but beyond those violations, "almost any restrictions" could be imposed.[227] The landlord would serve as "the sole judge" of what would trigger a no-trespass order.[228]

Landlords thus become the gatekeepers of a tenant's associational rights. Banning and trespass orders involving any space, whether public or private, often impede associational rights: individuals excluded from parks can no longer gather and converse with friends there,[229] people excluded from neighborhoods

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220 In other words, the landlords did not have special exclusionary authority under any statute, case law, nor the terms of the lease, but asserted this authority nevertheless. *Id.*

221 *Id.*

222 Pelton, *supra* note 125.

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.*

227 *Id.*

228 *Id.*

229 BECKETT & HERBERT, *supra* note 5, at 5.

cannot visit friends or family who live there,[230] and friends who usually meet at local businesses can be prevented from doing so by trespass affidavit programs.[231] But the impact on associational rights is exacerbated when the place of exclusion is the home. Homes are the center of one's personal interactions with others, the primary site of all sorts of familial, intimate, and social interactions.[232] In fact, "[t]he physical home [is often] a proxy for substantive privacy and privacy of intimate association."[233] Homes are important to privacy and personhood "not because homes symbolize intimate ties but because they so frequently shelter them."[234]

Members of the Supreme Court have acknowledged the fundamental importance of interactions in one's home in both *Moreno v. United States Department of Agriculture*[235] and *Village of Belle Terre v. Boraas*.[236] In *Moreno*, Justice Douglas specifically acknowledged that "the right to invite the stranger into one's home is . . . basic in our constitutional regime."[237] Similarly, in *Belle Terre*, the court queried whether the challenged ordinance would have affected "forms of association," and concluded that because the "family" at issue could still "entertain whomever it likes," the effect was minimal.[238]

Landlord exclusionary practices strike at the heart of what both justices were discussing. The practices directly infringe on the right to invite people into one's home and rights of association, and likely have a chilling effect. It would be a faithful friend indeed who would continue to visit when such visits could render them subject to unwanted police encounters and potentially to arrest.

2. Privacy and Dignity Harms

Questions of who has rights of access and exclusion might seem like dry legal questions about property. But property is not just about legal entitlements. It "is also about social approval of one's occupancy of space."[239] Laws and

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230 *Id.*

231 See Karteron, *supra* note 98; *see* Juanita Love, *Chamblee Police Department Launches Trespass Affidavit Program*, AJC (Dec. 20, 2019), https://www.ajc.com/news/local/chamblee-police-department-launches-trespass-affidavit-program/8wPpw0qEEQEvaXMQwAGUZI/.

232 Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 950 (2010).

233 *Id.*

234 *Id.*

235 413 U.S. 528 (1973).

236 416 U.S. 1 (1974).

237 413 U.S. at 543 (Douglas, J., concurring)

238 416 U.S. at 9.

239 Roark, *supra* note 56, at 56.

policies about who can use what land "reflect society's approval or disapproval of individual or group actions in public and private spaces."[240] Property rights are fundamentally about the collective recognition of "one person's entitlement over another's to space," and they speak to our societal values.[241] To renters, enhancing exclusionary powers for landlords signals that wealth determines power over space, and a renter's associational, privacy, and dignitary rights matter less than the wishes of a landlord (and their police partners).[242]

Exercising rights of privacy usually requires space, autonomy, seclusion, and the protection of intimacy, all characteristics that homes usually provide people, and all characteristics that are implicated by rules that allow landlords to exclude guests.[243] Inherent in the exercise of this landlord power is the sense that both renters and guests are continually being watched, surveilled, and monitored in place.[244]

The dignity of both renters and guests is also affected by enhanced landlord exclusionary powers. Guests are constructed as unwanted, contributing to feelings of unwelcomeness and unworthiness, while renters are constructed as making unwise or careless decisions, or as bad judges of character.[245] Tenants are denied the privacy rights that a property owner receives, contributing to the social marginality of both renters and their visitors.[246]

3. Eviction and Arrest

Additionally, expanded landlord exclusionary powers have at least two deleterious practical effects. First, enhanced landlord exclusionary powers simply make it easier for police to stop people: "[b]anishment policies create reasonable suspicion that the crime of trespassing is, has, or is about to occur. If an officer observes an individual on [property subject to banning], the officer can stop the individual under reasonable suspicion that he or she is trespassing."[247] Stops mean that the petty criminal acts that many people routinely engage in, such as possession of small amounts of drugs, are much

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240 *Id.*

241 *Id.* at 57.

242 *Id.* at 121.

243 DOMINICK VETRI, LAWRENCE C. LEVINE, JOAN E. VOGEL & IBRAHIM J. GASSAMA, TORT LAW AND PRACTICE 1056 (5th ed. 2016).

244 *See* Swan, *supra* note 97, at 899.

245 *See* BECKETT & HERBERT, *supra* note 5, at 21–22.

246 *Id.*

247 Torres et al., *supra* note 30, at 2.

more likely to be detected and exposed.[248] Enhanced exclusionary powers, therefore, tend to lead to a marked increase in arrests, usually for the kinds of misdemeanors or petty crimes that are now the focus of numerous criminal justice reform proposals.[249]

Second, once a visitor has notice that future attempts to visit the property will constitute criminal trespass, the tenant can be subject to eviction if the guest tries to come back.[250] Many cities have mandated that landlord-tenant leases must contain a provision providing for eviction if a member of a tenant's household or a guest engages in a criminal act, including criminal trespass, regardless of whether the tenants themselves knew or participated in that act.[251]

a. Visitors Face Arrest

Once a visitor has been warned that they are not wanted on the premises, any further attempts to visit constitute criminal trespass.[252] If found on the property again, the visitor can be arrested.[253] But it is not just those who have been warned who are subject to increased risk of arrest. In many buildings subject to enhanced landlord exclusionary powers, police stop all sorts of visitors, looking for those who have been or should be banned.[254] Banning and exclusion laws "provide the police greater license to question and [possibly] arrest" everyone in a given building's space.[255]

Not surprisingly, individuals have stated that these unwarranted police stops "have caused them to feel 'violated,' 'disrespected,' 'angry,' and 'defenseless.' As the Supreme Court acknowledged in *Terry v. Ohio*, even limited stops and searches [by the police] represent 'an annoying, frightening, and perhaps humiliating experience.'"[256]

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248 *Id.* at 17.

249 *See, e.g.*, ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018).

250 For the jurisdictions that have enacted crime-free ordinances, any criminal act of a guest, including trespass, is enough to trigger eviction of the entire household. Swan, *supra* note 97, at 844. Even for those jurisdictions that are not part of the crime-free program, many leases provide for eviction if a tenant's guest violates a term of the lease. *Id.* A trespass as a result of an invitation would constitute a lease violation. *Id.*

251 *Id.* (describing the crime-free housing program, which thousands of municipalities have adopted). Under the crime-free housing program, leases must contain a term providing for eviction under these circumstances, even when the tenant did not know or participate in the wrongdoing. *Id.*

252 Torres et al., *supra* note 30, at 1.

253 *Id.*

254 *Id.* at 6.

255 BECKETT & HERBERT, *supra* note 5, at 16.

256 Ligon v. City of New York, 925 F. Supp. 2d 478, 485 (S.D.N.Y. 2013).

Further, arrests themselves have a whole host of negative effects. Regardless of whether they ever lead to criminal conviction, the simple fact of an arrest can trigger a host of serious consequences, "including deportation, eviction, license suspension, custody disruption, or adverse employment actions."[257] Arrests also act as "a barrier to entry in employment, public benefits, and other contexts," serving as a "negative curriculum vitae" constantly haunting applicants.[258] Some employers "automatically suspend or terminate workers after learning of [an] arrest," and prospective employers "regularly require potential employees to disclose any prior arrest history."[259] And arrests often disqualify applicants seeking public housing or trying to cohabit with a family member who lives in public housing.[260]

b. Tenants Face Eviction

As often articulated in the lease terms, for tenants associated with guests that commit criminal trespass, eviction can result.[261] Eviction is "a severely consequential and traumatic event," which researchers have linked to "homelessness, material hardship, increased residential mobility, job loss, depression, and even suicide."[262] But while eviction is stressful for anyone, those with enough socio-economic resources are often eventually able to find equivalent housing.[263] For low-income tenants, though, eviction can be particularly devastating.[264] In fact, "[f]or many, if not most, low-income tenants, eviction leads to immediate homelessness."[265]

Greasing this slide toward homelessness is the stigma associated with evictions.[266] Often, "tenants named in an eviction proceeding, no matter the outcome or the context, find themselves placed on damning registries collected

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257 Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 809 (2015).

258 *Id.* at 825.

259 *Id.* at 812, 825.

260 *Id.* at 824–25.

261 Swan, *supra* note 97, at 823. The lease often includes a provision indicating that a guest's trespass can be viewed as a bad act on the part of the tenant. For example, the trespass clause that forms part of landlord-tenant leases in Casa Grande, Arizona, states that if a guest receives a trespass notice, "[t]he tenant(s) will also be served with the appropriate violation notice. Continual violation of this or any other leas[e] clause subject (the tenants) to eviction." *Learn Crime Free Leasing Principles*, CITY OF CASA GRANDE, https://casagrandeaz.gov/crime-free-multi-housing/ (last visited Feb. 21, 2021).

262 Swan, *supra* note 97, at 878–79 (citation omitted)

263 *Id.* at 879 (citing Matthew Desmond, Weihua An, Richelle Winkler & Thomas Feriss, *Evicting Children*, 92 SOC. FORCES 303, 303 (2013)).

264 *Id.*

265 *Id.* (citing Levy, *supra* note 33, at 564).

266 Paula A. Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661, 663 (2018).

and maintained by 'tenant reporting services.'"[267] Tenants whose names appear on these so-called "'blacklists' are often denied future renting opportunities, stigmatized, and excluded from the promise of fair housing."[268] "Many landlords will not rent to persons who have been evicted, and an eviction can also ban a person from affordable housing programs."[269] Moreover, in practice, "[t]enants who are evicted often lose not only their homes but their possessions as well, stripping them of the few assets they had."[270] Families are intensely disrupted, as tenants and their children may find themselves in a variety of temporary shelters, struggling to make it to school and work, and set on a downward spiral of declining opportunity.[271]

III. ARGUMENTS FOR BANNING

Despite the negative impacts of enhanced landlord exclusionary powers, it is not hard to see why some policymakers would nevertheless find such powers attractive. First, these powers seem to coincide with the public interest; they seem like they could increase public safety and decrease crime, goals that are universally desired. Less obviously, there is also a plausible argument for these enhanced powers that centers on private interests. There is an initially appealing argument that because landlords can now be liable for third-party criminal acts on the premises, they should have a corresponding power to ban suspicious guests.

A. Public Interest

Supporters of enhanced exclusionary powers for landlords often make public interest arguments, arguing that these enhanced powers will increase the safety of tenants, residents, and neighbors.[272] Everyone wants safe, crime-free homes

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267 *Id.* (citation omitted).

268 *Id.*

269 MATTHEW DESMOND, POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, SETTING OFF A CHAIN OF HARDSHIP 2 (2014), https://www.macfound.org/media/files/HHM_Research_Brief_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf.

270 Swan, *supra* note 97, at 879 (quoting DESMOND, *supra* note 269, at 2).

271 DESMOND, *supra* note 269, at 2.

272 *See* Suk, *supra* note 97, at 66 (noting "the invocation of the public interest to justify the control of home space and intimate relationships within it"). One variation of this argument is that tenants themselves might want landlords to ban others. However, as a tenant's organization wrote in an amicus brief filed in *Virginia v. Hicks*, "Inarguably, public housing residents should not have to tolerate dangerous and crime-ridden communities. Yet, it would be perverse to pursue the goal of crime prevention to the exclusion of all other rights and interests of public housing residents. The quality of residents' lives is comprised of a multitude of factors, not simply safety. Public housing residents, like those who live in private housing, can and should expect to be safe in their communities and to exercise their rights to live a 'normal' life." Janet Weiner, Trespass Policies in Public

and neighborhoods, and banning seems like a good way to achieve this.[273] Not surprisingly then, new banning proposals are constantly being proposed in the name of the public interest. For instance, some professors have argued that residents in troubled neighborhoods should form private neighborhood associations to access enhanced banning powers.[274] In their view, this would "virtually guarantee . . . greater safety from crime: No criminals need apply, strangers are stopped before entering, and troublemakers are easily evicted."[275] So, even though "civil rights groups and other organized supporters of inner city residents often seek to undermine suburban powers of exclusion," these academics suggest that "a wiser approach . . . might be to bring suburban powers of exclusion—the rights of private property, if now in a collective form—into the inner city."[276] These Block Improvement Districts, as one professor has termed them, would allow neighborhood residents to "exercise the right to exclude," which would have the cascading effect of "municipalities simultaneously enabl[ing] their police to protect, and ultimately revitalize, those neighborhoods by enforcing the property rights of those residents through criminal trespass law."[277]

The same logic underlies landlord enhanced exclusionary powers,[278] and finds support in the theory of broken windows policing.[279] The "broken

Housing xii (Jan. 1, 2016) (Ph.D. dissertation, University of Pennsylvania) (ScholarlyCommons) (quoting Brief for Amici Curiae Richmond Tenants Organization et al., Virginia v. Hicks, 539 U.S. 113 (2003) (No. 02-371), 2003 WL 1792256).

[273] Whether residents support using banning mechanisms to achieve these goals is a matter of some debate. Similar debates circulated around the gang ordinances. *See, e.g.*, Tracey L. Meares & Dan M. Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245, 258–59 (1998); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197, 198 (1998).

[274] Peter M. Flanagan, Note, *Trespass Zoning: Ensuring Neighborhoods a Safer Future by Excluding Those with a Criminal Past*, 79 NOTRE DAME L. REV. 327, 386 (2003) (citing Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 866, 879 (1999); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 109 (1998)).

[275] Flanagan, *supra* note 274, at 386 (citation omitted).

[276] *Id.* at 384.

[277] *Id.* at 338.

[278] These arguments were also at play in *Virginia v. Hicks*. *See* Weiner, *supra* note 272, at xi. Virginia argued that the public housing area was "an open-air drug market" before the trespass policy was put into place. *Id.* Justice Ruth Bader Ginsburg likened the policy to "a gated community," and analogized that if wealthy people could have a gated community, so could the poor. *Id.* "'You're saying the public housing authority can't create for people in the projects a gated community,' she said. 'People who live outside can have it, but poor people can't have it.'" *Id.* "Unlike residents of gated communities, however, public housing residents rarely have other housing options." *Id.* at 20.

[279] *See* Karteron, *supra* note 98, at 677. It is also connected to the idea of "community policing," which "focuses on the notion of partnerships between police and community." *Id.* at 678.

windows" theory suggests that low-level offenders and disreputable people must be kept out of neighborhoods, or "more serious criminals will eventually invade [them]."[280] So, "[r]ather than waiting for serious crime to occur and trying to apprehend a suspect, police should be proactive and address those conditions in which crime allegedly incubates."[281] Thus, "[t]o 'fix' broken windows means, in large part, using the police's coercive power to remove undesirable people from public space."[282]

Broken window policing's focus on addressing crime before it really begins, though, means that this form of policing is not really responsive to actual crime problems, but instead to the idea that they *could* happen. This anticipatory mentality permeates through many policing-based housing policies, including not only just banning, but also rules like those excluding individuals with criminal histories from renting.[283] But when policies are aimed at crime prevention in the abstract, they are often driven less by facts and social science evidence and more by "the myth of criminality."[284] Many of the jurisdictions that have enhanced landlord exclusionary powers have not had actual crime problems at residences.[285] But they fear they could, and this fear corresponds with the broader and "widespread fear in American communities that allowing certain people [in] . . . will threaten their safety, well-being, and prosperity."[286] Thus, people who belong to groups historically viewed with suspicion are "required to justify their presence in spaces,"[287] with broken windows policing providing a theoretical basis for this requirement and supporting "the banning of unwanted and disorderly" individuals.[288]

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280 BECKETT & HERBERT, *supra* note 5, at 24.

281 *Id.* at 32–33.

282 *Id.* at 33.

283 Archer, *supra* note 108, at 804. Archer uses the term "policing-based housing policies" because these housing policies "are grounded in popular theories of policing, such as 'broken windows' . . . and 'hot-spots policing,' . . . [and they] adopt many of the enforcement goals, strategies, values, and narratives of the criminal legal system." *Id.* at 792.

284 *Id.* at 41.

285 *See* Swan, *supra* note 97, at 892 (citing Carmen Greco Jr., *Law Takes Aim at Troublesome Tenants*, CHI. TRIB. (Jan. 23, 2009), https://www.chicagotribune.com/news/ct-xpm-2009-01-23-0901210789-story.html).

286 Archer, *supra* note 108, at 832.

287 *Id*. at 833.

288 BECKETT & HERBERT, *supra* note 5, at 16. Perceptions of disorder are also highly racialized. One study found that "if two neighborhoods had exactly the same amount of graffiti and litter and loitering, people saw more disorder, more broken windows, in neighborhoods with more African-Americans." Shankar Vedantam, Chris Benderev, Tara Boyle, Renee Klahr, Maggie Penman & Jennifer Schmidt, *How a Theory of Crime and Policing Was Born, and Went Terribly Wrong*, NPR (Nov. 1, 2016, 12:00 AM), https://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong.

Broken windows theory, though, is not as strong a basis of support as one might think. A recent study suggested that there is no discernible link between disorder and crime, so there is no need to preemptively ban suspicious or disorderly people.[289] However, broken windows theory is actually based on the premise that such a link is possible, not that it will always be found to demonstrably exist.[290] In this sense, then, to the extent that broken windows theory is less of a descriptive theory and more "fundamentally a normative argument," it may be impossible to really prove or disprove it.[291]

In this regard, the widespread adoption of broken windows policing reflects a troubling but remarkably common trend in governance generally: laws and policies are frequently adopted on the basis that they sound like they could work, but there is either conflicting, little, or no research or empirical evidence actually supporting them.[292] "[M]any theoretical accounts in politics, criminal justice, and public policy are not validated," yet they are implemented.[293]

As an offshoot of broken windows theory, banning practices fit into the above category of a policy implemented because it sounds like it could work, but with little underlying data to support it.[294] However, in 2016, an empirical study of the impact of banning on crime in public housing was finally conducted.[295] It shows that, at least in that context, banning policies actually have little to no impact on crime and safety.[296] Using eight years of data from six public housing complexes and thirteen surrounding areas, the study concluded that banning "ha[d] only a modest impact on property crime" and "ultimately . . . no significant impact on violent crime."[297] The relationship

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289 *See* Greg St. Martin, *Researchers Find Little Evidence for 'Broken Windows Theory,' Say Neighborhood Disorder Doesn't Cause Crime*, PHYS.ORG (May 16, 2019), https://phys.org/news/2019-05-evidence-broken-windows-theory-neighborhood.html (discussing Daniel T. O'Brien, Chelsea Farrell & Brandon C. Welsh, *Looking Through Broken Windows: The Impact of Neighborhood Disorder on Aggression and Fear of Crime Is an Artifact of Research Design*, 10 ANN. REV. CRIMINOLOGY 53 (2019); Daniel T. O'Brien, Chelsea Farrell & Brandon C. Welsh, *Broken (Windows) Theory: A Meta-Analysis of the Evidence for the Pathways from Neighborhood Disorder to Resident Health Outcomes and Behaviors*, 228 SOC. SCI. & MED. 272 (2019)).

290 *See* Mike Rowan, *The Illusion of Broken Windows Theory: An Ethnographic Engagement with the Theory That Was Not There*, 9 WM. & MARY POL'Y REV. 1, 2, 22 (2017).

291 *Id.* at 5.

292 *See* Torres et al., *supra* note 30, at 2 (noting that prior to their study, "an empirical evaluation of the impact of banishment on reducing crime or making drug arrests ha[d] not been performed").

293 BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 57 (2001).

294 BECKETT & HERBERT, *supra* note 5, at 34.

295 Torres et al., *supra* note 30, at 62.

296 *Id.* at 19.

297 *Id.* at 61, 80.

between banning and property crime was "relatively small," such that twice as many bans would have to be issued to achieve "a return of only a 5% reduction in property crime."[298]

Given the significant costs banning imposes on tenants and guests, evidence of a modest reduction in only property crime seems like a small benefit, and suggests that banning does not enhance public safety as promised.[299] In fact, it is possible that even this modest benefit comes at a greater overall cost.[300] On closer inspection, banning policies may be not only ineffective, but actually counterproductive.[301] Numerous social science studies have shown that "dense and robust networks of community ties" and "basic social ties—family, friends . . . —form the building blocks of informal social control, and at the individual level, robust social, familial, and economic ties are causally related to an individual's avoidance of criminal behavior."[302] Simply put, strong social and family ties help prevent crime.[303] Banning policies, however, are anathema to these bonds. They result in fragmentation, alienation, and isolation—all criminogenic factors. In sum, there is scant evidence showing that banning produces worthwhile gains in public safety, and there is reason to believe that banning may actually work against this goal in the long term.

B. Private Interests of Landlords

On the private interest front,[304] courts and commentators have made initially plausible arguments rooted in third-party liability.[305] For instance, one court found that the common law rule that a tenant's right of invitation trumped that of the landlord might be rationally dependent on another common law rule, namely "that the landlord has no obligation to protect his tenants."[306] But,

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298 *Id.* at 77.

299 *Id.* at 17, 19.

300 *Id.*

301 *See id.*; *see also* Swan, *supra* note 97, at 894 (describing how policies that separate individuals from family systems may increase the risk of criminal behavior).

302 Swan, *supra* note 97, at 894–95 (citing Levy, *supra* note 33, at 540).

303 *Id.*

304 Many landlords wholeheartedly embrace having additional exclusionary powers and are delighted to use them. *See* City of Bremerton v. Widell, 51 P.3d 733, 739 (Wash. 2002). But while many landlords do consent, the participation of others looks much more like coercion. *See* MAZEROLLE & RANSLEY, *supra* note 179, at 45–46. When the police partner with private landlords and encourage them to exercise and delegate this exclusionary power, they often do so within regulatory regimes that threaten landlords with negative consequences if they do not comply. *Id.* at 46. Thus, while often landlord exclusions are a landlord-versus-tenant situation, they are also sometimes a police-versus-landlord-and-tenant scenario as well. *Id.* at 45–46.

305 *See, e.g.*, *City of Bremerton*, 51 P.3d at 738.

306 *Id.*

according to the court, since that latter rule has now been altered—landlords now may, in some circumstances, be liable for third-party criminal acts on the premises—the former should be altered as well, and a landlord right of exclusion should accompany this new landlord duty.[307] As the court stated: "Should a landlord be held civilly liable for the foreseeable criminal acts of third parties causing injury to the landlord's tenant? It would seem only reasonable that the landlord should at the same time enjoy the right to exclude persons who may foreseeably cause such injury."[308]

The court is quite correct that, in the 1970s, courts began imposing third-party liability in a number of contexts, one of which was in relation to landlords.[309] The landlord duty of care that developed likely "include[s] measures to protect others from criminal attacks, provided the attacks are reasonably foreseeable and preventable."[310]

In actuality, though, landlord liability cases almost never involve an issue of misconduct on the part of a tenant's invited guests.[311] Most landlord liability cases involve third-party strangers who come onto residential premises as a result of lax security, and gain access to apartments through negligent acts like landlords who leave keys unattended or fail to fix broken locks.[312] For example, the seminal landlord duty case, *Kline v. 1500 Massachusetts Avenue Apartment Corp.* has nothing to do with invited guests, but is instead about a lack of security that allowed a stranger to access the common areas and assault the plaintiff.[313] The cases are about strangers who access apartment building interiors because of a lack of "adequate lighting, security services and locks,"[314] not about misbehaving guests.[315]

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[307] *Id.* at 738–39.

[308] *Id.*

[309] *Id.* at 738.

[310] *Id.*

[311] *See Cause of Action Against Landlord for Failure to Protect Tenants Against Criminal Acts*, 34 CAUSES OF ACTION 2d 105 § 1 (2020) [hereinafter *Cause of Action Against Landlord*].

[312] *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 479–80 (D.C. Cir. 1970). Some are also about perpetrators associated with the landlord. *See* Doe v. Linder Constr. Co., 845 S.W.2d 173, 175–76 (Tenn. 1992) (involving a landlord who left apartment keys accessible to workers and others). The superintendent had hired his son to do wallpapering and painting. *Id.* at 175. The son and his friend obtained the key and used it to gain entry into a woman's apartment, where they raped her. *Id.* at 175–76. For a discussion of this case, see Leslie Bender & Perette Lawrence, *Is Tort Law Male: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1993).

[313] 439 F.2d at 479–80.

[314] B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 688 (1992).

[315] *See also Cause of Action Against Landlord*, *supra* note 311 (noting that these cases "most typically arise when a tenant is assaulted in an apartment building lobby by an assailant who was able to enter the building

If a guest were to criminally attack a tenant or third party, it would be very difficult for a plaintiff to establish that the attack was foreseeable and preventable.[316] Courts have acknowledged that landlords have no special knowledge or expertise with which to judge risk.[317] A landlord's assessment of whether a guest is "risky" is necessarily governed by little else than an observation of that person.[318] As one court noted in the context of a claim that a landlord should have known a mentally-ill tenant was potentially dangerous: "[a] landlord is not competent to assess the dangerous propensities of his mentally ill tenants."[319]

Moreover, even without enhanced exclusionary powers, landlords already have access to remedial mechanisms if they are legitimately concerned about a tenant's guest. Like anyone else, landlords can of course call the police if they see someone engaged in a criminal act.[320] And landlords can always access civil eviction remedies that allow them to "terminate the tenancy" of tenants whose guests are a problem.[321] What the enhanced exclusionary powers do is let a landlord "substitute the coercive power of the police for the civil eviction remedies created by [the legislature]."[322] As the dissenting judge in *Williams v. Nagel* explained:

> Until today, the sole recourse for a landlord who disapproved of his tenant's guests was to terminate the tenancy. Now, there is no longer a need to bother with civil process. The landlord can just call the police and have the tenant's guests hauled away to jail. That the guests may include the father of the tenant's children, or the tenant's son, or some other family member is apparently of no consequence.
>
> Such a result is as offensive as it is unprecedented. As much as we may sympathize with the need of property owners to protect their investments and insure [sic] that their tenants have a safe place to live, they have no more of a claim on the authority of the State than do their renters or the friends and relatives of their renters.[323]

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due to the landlord's failure to provide adequate locks on exterior doors").

316 Courts often take a narrow view of foreseeability in this context. *See, e.g.*, Morgan v. Dalton Mgmt. Co., 454 N.E.2d 57, 60–61 (Ill. Ct. App. 1991).

317 Davis v. Gomez, 255 Cal. Rptr. 743, 745 (Cal. Ct. App. 1989).

318 *See id.* at 744–75.

319 Gill v. N.Y.C. Hous. Auth., 519 N.Y.S.2d 364, 370 (App. Div. 1987).

320 Williams v. Nagel, 643 N.E.2d 816, 824 (Ill. 1994) (Harrision, J., dissenting).

321 *Id.*

322 *Id.*

323 *Id.* at 824–25.

Just as the public interest argument was based on the specter of potential criminality, this private interest argument is also rooted in the concepts of foreseeability and possible risk. Exclusion is framed here as an act of risk prevention, preventing a guest from committing a violent and injurious act, and preventing the landlord from being liable for that act. Notably, risk has an important relationship to many contemporary forms of social control, including exclusion, where criminal and civil "[i]nterventions are not directed at determining [individual] responsibility or ensuring accountability," so much as they are focused on "managing and regulating risky groups."[324] Risk is constructed as an inherent characteristic of an "underclass" of people, "a segment of society increasingly excluded and marginalized" that needs to be "managed and controlled."[325] Order-maintenance becomes about focusing on "identifying, ordering and responding to risks, and providing . . . assurances that the risks are under control," and responding to an idea of crime, rather than to actually occurring problems.[326]

IV. CIRCUMSCRIBING EXCLUSION

Ultimately, no public or private interest justifies an unfettered form of enhanced landlord exclusionary power. The jurisdictions that have altered the balance of power between tenants and landlords should revert back to the original formulation. No actual problems had been identified with the traditional common law regime: enhanced landlord exclusionary powers were not implemented as a response to any growing crisis in residential buildings or special issue that needed resolving.[327] Rather, the expansion was simply an outgrowth of the "expansionary logic" of exclusion itself.[328] The original regime worked well before and would work well again.[329]

Using a cost-benefit analysis, the risk of discriminatory application, the reinforcement of existing social hierarchies, and the infringement on privacy and autonomy interests that accompany enhanced landlord exclusionary powers are not outweighed by any other overriding benefit or justification.[330] There is no evidence that landlords have any special ability to judge the "dangerousness" of

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[324] MAZEROLLE & RANSLEY, *supra* note 179, at 15.

[325] *Id.* at 16.

[326] *Id.* at 15.

[327] *See* Torres et al., *supra* note 30, at 1; Swan, *supra* note 97, at 836–38, 892, 894.

[328] BECKETT & HERBERT, *supra* note 5, at 19. The policymakers who brought exclusionary practices into public housing rationalized doing so on the basis of a high crime rate in those complexes. *See* Torres et al., *supra* note 30, at 1.

[329] *See* Swan, *supra* note 97, at 836–38, 894.

[330] *See* Torres et al., *supra* note 30, at 17, 19; Swan, *supra* note 97, at 855–59, 871–74, 894, 900.

a guest; rather, such decisions will almost inevitably come down to suspicions and bias.[331] Public safety is not enhanced by appointing landlords as the final arbiters of the risk a person poses. Even assuming that landlords do sometimes have legitimate concerns about a guest, there are numerous effective mechanisms already available to protect public safety and property.[332] The available evidence suggests that enhanced exclusionary powers have significant costs, with only a small potential benefit.[333]

The best solution to the problems posed by enhanced landlord exclusionary powers is simply to halt this burgeoning expansion and return to a regime in which renters hold the rights of exclusion. Agitation at the state legislature level could fix regimes like those currently in place in Illinois and Arizona, while agitation at the grassroots level could help disrupt the ad hoc expansions in the localities that have built landlord exclusions into their systems of municipal ordinances.

However, some advocacy groups and legislatures prefer to allow a limited enhancement of landlord exclusionary power. The ACLU, for instance, proposes that a landlord power to ban could be justified as long as there was "sufficient proof of criminal activity on or near the premises that poses a threat to the residents."[334] Urbana, Illinois, proposed a similar restriction, dictating that landlords could exclude invited guests, but only if "the guest had been arrested for engaging in criminal activity on the property."[335]

In Virginia, the applicable Residential Landlord and Tenant Act limits banning to the following circumstances:

> A. A guest or invitee of a tenant may be barred from the premises by the landlord upon written notice served personally upon the guest or invitee of the tenant for conduct on the landlord's property where the premises are located that violates the terms and conditions of the rental agreement, a local ordinance, or a state or federal law[.]
> B. [A] landlord may apply . . . for a warrant for trespass[.]

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331 Gill v. N.Y.C. Hous. Auth., 519 N.Y.S.2d 364, 368 (App. Div. 1987); Davis v. Gomez, 255 Cal. Rptr. 743, 744–45 (Cal. Ct. App. 1989). For a summary of studies linking race with perceptions of dangerousness, see German Lopez, *Study: People See Black Men as Larger and More Threatening Than Similarly Sized White Men*, VOX (Mar. 17, 2017, 8:00 AM), https://www.vox.com/identities/2017/3/17/14945576/black-white-bodies-size-threat-study.

332 *See, e.g.*, Williams v. Nagel, 643 N.E.2d 816, 824 (Ill. 1994).

333 *See* Torres et al., *supra* note 30, at 17, 19; Swan, *supra* note 97, at 855–59, 871–74, 894, 900.

334 Becker, *supra* note 24.

335 Gehrig & Smyth, *supra* note 36, at 1 app.II.

> C. The tenant may file a tenant's assertion . . . requesting that the general district court review the landlord's action to bar the guest or invitee.[336]

At the very least, these limitations stay on the right side of fair housing laws, which allow landlords to exclude non-residents if those non-residents have engaged in prior criminal activity on the premises.[337] However, the "on the premises" piece is an important proviso, since "[a] blanket rule banning all non-residents with a prior arrest or conviction (not necessarily related to the premises or ban not time limited) could constitute race discrimination due to its disparate impact on people of color or ethnic minorities."[338]

A. Home Rule Solutions

As the Urbana, Illinois, example above suggests, a municipality can sometimes pass laws prohibiting a landlord from banning guests.[339] Because Urbana was particularly concerned "that tenants have very little power to persuade landlords to remove from leases clauses that are vague or unfair," Urbana took steps to preclude landlords from initiating such clauses.[340] Specifically, Urbana proposed prohibiting any provisions in landlord-tenant agreements that would:

> Allow[] the landlord to issue a no-trespass notice to or to otherwise ban a tenant's invited guest for any reason other than that (A) the guest had been arrested for engaging in criminal activity on the property, and (B) the charge(s) had not been subsequently dropped, or the person arrested had not subsequently been acquitted of the charge.[341]

In its proposal, Urbana noted that "[s]ixty-three percent of households in Urbana rent their housing," and "these renters are vulnerable to the potentially capricious use of no-trespass orders that would deny them the freedom to be visited by

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336 VA. CODE ANN. § 55.1-1246 (West 2019).

337 Nat'l Hous. L. Project, *supra* note 119, at 135.

338 Catherine Bishop, National Housing Law Project, Webinar on Assisting Families with Members Who Have a Criminal Background Get Admitted to Federally Assisted Housing and Challenges to Banning and Trespass Policies (Dec. 6, 2011); *see* Fair Housing Act, Pub. L. No. 90-284 § 804, 82 Stat. 73, 83 (1968) (codified as amended at 42 U.S.C. § 3604).

339 Gehrig & Smyth, *supra* note 36, at 1. Urbana's ordinance conflicts with the Illinois Civil Code term stating that a "landlord shall have the power to bar the presence of a person from the premises owned by the landlord who is not a tenant or lessee or who is not a member of the tenant's or lessee's household." Anderson-Bey v. Martin, No. 110311-U, 2012 WL 6967271, at *2 (Ill. App. Ct. May 17, 2012) (quoting 735 ILCS 5/9-106.1(f) (West 2010)). However, the home rule powers in Illinois are such that the Illinois appellate court has previously upheld "[a] city's right to prohibit certain lease clauses." Gehrig & Smyth, *supra* note 36, at 1.

340 Gehrig & Smyth, *supra* note 36, at 1 app.II.

341 *Id.*

friends or family members who could be banned entry onto the property for no reason and without due process."[342]

Whether a municipality can pass ordinances prohibiting landlords from excluding guests unless certain conditions are met will depend on the particular home rule powers of that locality.[343] In Illinois, courts had previously affirmed "[a] city's right to prohibit certain lease clauses," but in other states, a locality's power may not be so extensive.[344]

Where it is not, this can actually serve as an argument against municipalities that have passed ordinances giving landlords enhanced exclusionary powers.[345] In similar contexts to landlord exclusions, plaintiffs have successfully argued that it is outside a city's home rule powers to impose a mandatory term in a contract between a landlord and tenant.[346] Sometimes, such clauses will be viewed as attempts to "enact private or civil law governing civil relationships," a power left to the states in many jurisdictions.[347]

B. Constitutional and Statutory Claims

Individuals affected by these exclusionary practices also have a number of legal options available. They could, in some circumstances, bring contractual or common law claims.[348] And they could bring state and federal constitutional challenges.[349] Some courts have been very receptive to constitutional challenges in the other banishment contexts,[350] holding that bans from public spaces violate

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342 *Id.* at 1.

343 For a description of home rule powers, see Swan, *supra* note 97, at 828–29.

344 Gehrig & Smyth, *supra* note 36, at 1.

345 *See* Swan, *supra* note 97, at 883.

346 *Id.*

347 *See id.* (citation omitted). For example, in a case in which a Cedar Rapids, Iowa, landlord's association group challenged a city ordinance prescribing a mandatory term in a landlord-tenant lease, the association successfully argued that it was outside the city's home rule powers to impose a mandatory term in a contract between a landlord and tenant. *Id.* The specific rationale was that the clause was an attempt to "enact private or civil law governing civil relationships," a power left to the states. *Id.*

348 Nat'l Hous. L. Project, *supra* note 119, at 131.

349 *Id.* at 131, 136.

350 *See, e.g.*, Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 749 (S.D. Ohio 2000), *aff'd*, 310 F.3d 484 (6th Cir. 2002).

the right to travel,[351] the right to remain,[352] and sometimes the principles of double jeopardy.[353]

These particular claims, however, are unavailable or less salient when the issue is landlord banning from a private home. Claims rooted in the right of association are arguably the most resonant in this context, and claims sounding procedural due process are also possible. Additionally, there are some potential avenues of relief under fair housing laws.

Unfortunately, none of these claims seem particularly well-poised to defeat landlord bannings. Courts have shown a high degree of tolerance for housing policies that purport to further public safety and other policing goals, even when they negatively affect the rights of tenants.[354]

Further, many of these potential legal claims are complicated by an important feature of trespass exclusion: while the story of exclusion diffusion is one of the movement of exclusion through public and into purely private spaces, it is also, ironically, a story about the continual erosion of that public-private boundary. This erosion of the public-private boundary occurs in three main ways.

First, exclusion laws combine criminal and civil laws into one hybrid mechanism. Trespass exclusion uses a civil order to criminalize the act of being in an excluded zone.[355] The civil nature of the initial order makes it more difficult to complain about its criminal enforcement, so that "[t]he legal hybridity of these [exclusionary] techniques diminishes the rights-bearing capacity of their targets."[356] In part, because of this initially civil nature, there is often "[no] right to challenge the basis or the scope of the exclusion order."[357] Then, once the order has been given, "the excluded individual need not engage in criminal activity, nor even be suspected of it" to be arrested in the excluded zone: mere

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[351] *See* Embry v. City of Cloverport, No. 3:02CV-560-H, 2004 WL 191693, at *3 (W.D. Ky. Jan. 22, 2004).

[352] "Three Justices of the Supreme Court have posited the existence of such a constitutional right. In *City of Chicago v. Morales*, in the context of striking down Chicago's Gang Congregation Ordinance, Justices Stevens, Souter, and Ginsburg identified a 'freedom to loiter for innocent purposes,' meaning there is a constitutional right 'to remain in a public place of . . . choice.' But in a biting dissent Justice Scalia ridiculed the notion that there is any such right, and it has not yet achieved any significant traction." Stephen E. Henderson, *"Move On" Orders as Fourth Amendment Seizures*, 2008 BYU L. REV. 1, 2 (2008).

[353] Double jeopardy is not going to be applicable in the landlord context because there is no double punishment. *See* Flanagan, *supra* note 274, at 346.

[354] See Archer, *supra* note 108, at 14–15.

[355] BECKETT & HERBERT, *supra* note 5, at 15.

[356] *Id.*

[357] S. LEGAL COUNS., *supra* note 44, at 49.

presence is criminalized.[358] Thus, at the same time as the civil aspect shrinks the available legal avenues of contestation, the criminal aspect "expand[s] the authority of the criminal law."[359]

Second, property *itself* migrates across the porous public-private line. Public urban property is being continually transformed into private property, sometimes as a desperate attempt to raise revenue in a time of declining tax bases, and sometimes in a direct bid to increase exclusionary powers.[360] Further, at the same time as public property is being transformed into private, private property is itself continually opened up to move coercive forms of public control.[361] In other words, the public to private property phenomenon works in both directions: public property becomes private, just as private property becomes increasingly subject to public law enforcement.[362]

The continual conversion of public property to private property means that "[t]ruly public space—that is, spaces that are publicly owned, open to the general public, and where people actually congregate, has become a rarity in the modern age."[363] Fiscally distressed cities have been selling public land to private corporations to raise revenue, and there is a constant push to privatize public spaces.[364] As these spaces become increasingly private, the movement of trespass exclusion from public to private takes on added significance.

In some cases, property has moved from public to private not for fiscal reasons, but to deliberately enhance exclusionary rights. In *Virginia v. Hicks*, for instance, Richmond transferred ownership of a public street and sidewalk to a housing authority to give that housing authority specific trespass powers over that space.[365] Prior to this case, some courts had found that public housing was truly "public," in the sense that housing authorities had no right to exclude anyone from it.[366] The transfer in *Hicks* was part of a strategic move "designed

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358 Flanagan, *supra* note 274, at 329.

359 BECKETT & HERBERT, *supra* note 5, at 15.

360 Sarah Schindler, *The "Publicization" of Private Space*, 103 IOWA L. REV. 1093, 1110–11, 1151 (2018).

361 Beckett & Herbert, *supra* note 2, at 20. "[P]ublic and formerly public spaces are increasingly subject to trespass law as municipal governments convey public spaces such as sidewalks to private property owners and extend trespass law to public spaces such as parks. Conversely, trespass programs endow state authorities with the right to monitor and regulate access to private spaces normally open to the public." *Id.*

362 *Id.*

363 Cody J. Jacobs, *Guns in the Private Square*, 2020 U. ILL. L. REV. 1097, 1107 (2020).

364 Schindler, *supra* note 360, at 1106 (stating "there has been an increase in privatized public space").

365 539 U.S. 113, 115–16 (2003).

366 "[P]rior to 1991, public housing was considered a public space; no one could be arrested for entering lobbies or public hallways in these buildings. In the early 1990s, however, the trespass statute was amended to give public housing authorities the same capacity to exclude unwanted members of the public that is enjoyed by

to manipulate the boundaries between public and private space," a manipulation that ultimately defeated the excluded plaintiff's claim.[367] Through this transfer, housing authorities could treat the property as private, while working with public law enforcement to police it, a combination that ultimately allowed the housing authority to rebuff the plaintiff's claim.[368]

The blurring of public and private *enforcement* is the third way that trespass exclusion blurs the public-private line.[369] Although enhanced landlord exclusionary powers might sometimes be exercised at the sole discretion of the private landlord, police are often involved to varying degrees in that initial exclusionary decision.[370] Moreover, enforcement of those exclusionary decisions nearly always involves public law enforcement: police enforce those decisions, and they use criminal law powers to do so.[371]

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owners of private dwellings." BECKETT & HERBERT, *supra* note 5, at 8–9 (citing People v. Carter, 645 N.Y.S.2d 725 (N.Y. Crim. Ct. 1996)).

[367] Lisa E. Sanchez, *Enclosure Acts and Exclusionary Practices: Neighborhood Associations, Community Police, and the Expulsion of the Sexual Outlaw*, *in* BETWEEN LAW AND CULTURE: RELOCATING LEGAL STUDIES 126 (David Theo Goldberg, Michael Musheno & Lisa C. Bower eds., 2001).

[368] *Hicks*, 539 U.S. at 115–16, 124.

[369] This is part of the rising trend of third-party policing, under which traditional law enforcement continually enlists private actors in its order maintenance efforts. Swan, *supra* note 97, at 825. For example, in the landlord context, Zion, Illinois, fined landlords if the landlords did not cooperate with law enforcement by forcing tenants to consent to unconstitutional searches. Andrew Wimer, *Landlord and Tenants Temporarily Halt Illinois City's Unconstitutional Home Inspections*, INST. FOR JUST. (Sept. 27, 2019), https://ij.org/press-release/update-landlord-and-tenants-temporarily-halt-illinois-citys-unconstitutional-home-inspections/.

[370] *See* Swan, *supra* note 97, at 846. In the context of ad hoc landlord exclusion initiatives, much of the impetus driving landlords to exclude individuals comes from the police. *See id.* In municipalities that have incorporated the Crime-Free Housing Program's requirement that landlords have the power to exclude invited guests, landlords are required to participate in this order maintenance project. *Id.* at 825. And in fact, even the very notion of the state as a quintessential public actor is destabilized in this trespass exclusion context. Depending on the circumstances, the state is alternatively framed as more public or more private. For instance, in *Adderley v. Florida*, the Supreme Court noted that the government was entitled to enforce trespass laws on public property. 385 U.S. 39, 47 (1966). The Court stated that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* The Supreme Court made a similar pronouncement in the *Department of Housing & Urban Development v. Rucker*, though this time predicating the State's power on its *private* nature. Flanagan, *supra* note 274, at 378–79 (citing Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 135 (2001)). The Court "distinguished government action as a sovereign from its acts as a proprietor." *Id.* The Court stated that "[w]here the government acts" in its "private" capacity as a landlord, "the breadth of constitutional implications is far less wide than when it acts as a sovereign." *Id.*

[371] Flanagan, *supra* note 274, at 371. Sometimes this occurs in the eviction context as well. As the court in *McBride v. City of Westbrook* noted, "the Maine statute seems to contemplate [eviction] notice coming from the landlord. But the Westbrook Police Department holds itself out as the *agent* of the landlord in these notices, thereby arguably inserting itself into a private eviction procedure—in McBride's case, giving him 30 minutes to remove himself and his personal property from the premises, taking his keys and telling him that he was being evicted—yet simultaneously acting as official law enforcement authority in warning about arrests and penalties to follow." No. 13–CV–272–DBH, 2014 WL 7891597, at *7 (D. Me. Nov. 19, 2014).

1. The Threshold Issue of State Action

Unlike the other two blurrings of public and private, which usually work against anyone fighting exclusion, the blurring of private and public enforcement can actually work to the benefit of tenants and guests. This is because the blurring provides a path to meet the state action requirement necessary to ground a § 1983 claim. In scenarios where states or cities have passed legislation or ordinances granting landlords enhanced exclusionary powers, the law itself can obviously be challenged.[372] But in the context of ad hoc banning and exclusion—where landlords simply start doing it—potential plaintiffs must reckon with the state action hurdle.[373] The fact that landlords often act in concert with police in making and enforcing exclusionary decisions creates an opening for § 1983 claims. Section 1983 provides "a method for vindicating federal rights"[374] where a plaintiff can show that "the challenged conduct [is] attributable to a person acting under color of state law," and "the conduct . . . worked a denial of rights secured by the Constitution or by federal law."[375]

In *Meyer v. Village of Carpentersville*, a group of individuals who had been banned from a private but subsidized housing complex sued under § 1983.[376] The court found that even though the defendant landlords were private corporations, if the private landlords had engaged in joint action with the police, the state action requirement might nevertheless be met.[377] The court held that "[p]rivate defendants . . . act under color of law when they willfully participate in joint action with the State or its agents. . . . Here, Plaintiffs contend that the [landlords] are state actors because they jointly developed and maintained a list of 'undesirables' with the police."[378] This allegation was sufficient to ground a § 1983 claim.[379]

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372 *See, e.g.*, *McBride*, 2014 WL 7891597, at *1.

373 *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that judicial enforcement of restrictive racial covenants on real estate constituted state action).

374 Graham v. Connor, 490 U.S. 386, 393–94 (1989) (citation omitted).

375 Niles v. Town of Wakefield, 172 F. Supp. 3d 429, 438 (D. Mass. 2016) (quoting Soto v. Flores, 103 F.3d 1056, 1061–62 (1st Cir. 1997)).

376 No. 93C7429, 1994 WL 91991, at *1 (N.D. Ill. Mar. 21, 1994); 42 U.S.C. § 1983.

377 *Meyer*, 1994 WL 91991, at *1. The court provided a helpful example: "[w]hen a private individual unlawfully causes or procures an arrest by a police officer, that private individual may be liable for false arrest." *Id.* at *2.

378 *Id.* at *1.

379 *Id.* at *2. The court held that the plaintiffs "have alleged facts sufficient to withstand a motion to dismiss." *Id. But see* Williams v. Nagel, 643 N.E.2d 816, 819 (Ill. 1994) (holding that the plaintiffs had failed to establish "the required nexus" between state and private actors).

While the majority in *Williams v. Nagel* held that, in the circumstances of that case, the plaintiffs failed to establish state action, the dissent was of the same view as the *Meyer v. Village of Carpentersville* Court.[380] The dissenting judge noted that "[t]he real basis for plaintiffs' challenge is the abuse of the criminal trespass statute to assist the landlords in managing their property."[381] The judge found that the landlord and police were "engaged in a joint enterprise to systematically rid the premises of those they regarded as undesirable. The landlords decided whom they wanted to exclude, and the police used their arrest powers to exclude them."[382] The judge found that there was state action in such a circumstance.[383]

2. Rights of Association

When the exclusionary power comes from a specific statute or ordinance, or the state action hurdle has been otherwise cleared, the strongest federal or state constitutional arguments will likely sound in freedom of association.[384] Many courts have supported "the right of people to be free to structure their living arrangements, to conduct their intimate relationships within the walls of their dwelling place, and generally to order their 'home lives' however they wish."[385] Courts have held that rights of association are of significant importance and must "be secured against undue intrusion by the State," particularly "because of the role of such relationships in safeguarding . . . individual freedom."[386] Rights of intimate association claims are strongest when there is a familial relationship at issue, such as one involving the "creation and sustenance of a family—marriage, childbirth, the raising and education of children and cohabitation with one's relatives."[387]

However, intimate association claims may be somewhat limited in that some courts "have said there is a right to live together . . . but the right does not necessarily extend to a right to visit."[388] Some courts have said that the inability

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380 *Williams*, 643 N.E.2d at 824 (Harrison, J., dissenting); *Meyer*, 1994 WL 91991, at *1.

381 *Williams*, 643 N.E.2d at 824 (Harrison, J., dissenting).

382 *Id.*

383 *Id.*

384 For a discussion of the parameters of this right, see Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 625 (1980).

385 Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 FLA. L. REV. 1401, 1429 (2015).

386 Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

387 *Id.* at 619; Nat'l Hous. L. Project, *supra* note 119, at 141.

388 Bishop, *supra* note 338.

to associate in one particular location, even if that location is one's home, does not violate the right to intimate association.[389]

Additionally, there will be issues of standing regarding whether it is a tenant or a guest bringing the claim. For example, in *McBride v. City of Westbrook*, a woman and her boyfriend were issued a trespass notice that barred them from an apartment building, despite the fact that her daughter and grandchildren lived there.[390] When she claimed that the trespass notice infringed on her First Amendment right and substantive due process "right to associate with her daughter and grandchildren," the court held:

> [t]he criminal trespass notice in question does not limit Blake's freedom of association at any location other than 277 Main Street. That apartment building is private property over which the landlords have authority. Blake's daughter may possess rights *as a tenant* to have her mother visit her at her own apartment at 277 Main Street, but Blake's daughter is not asserting those rights in this lawsuit, and those tenant's rights are not Blake's rights.[391]

The question of what would occur when the resident, Blake, asserted those rights was left for another day.[392]

3. Procedural Due Process Claims

Procedural due process claims are also possible. A resident might be able to object to a landlord placing a guest on a ban list or argue that they have a right to have the guest removed from the list.[393] Here, a two-step analysis would apply. The first question would be whether residents were "denied [a] property interest in their homes for no legitimate reason."[394] The second step would analyze whether the procedures regarding that denial were insufficient.[395] In this regard, the nature of the tenant's property interest, and the "[l]iberty interest to association with guests" would both be important.[396] Courts would use the

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389 Nat'l Hous. L. Project, *supra* note 119, at 142.

390 McBride v. City of Westbrook, No. 2:13–CV–272–DBH, 2014 WL 7891597, at *1 (D. Me. Nov. 19, 2014). She had actually been a tenant of the building, banned for not paying rent. *Id.*

391 *Id.* at *2 (emphasis added). The court analogized to a public housing case, *Thompson v. Ashe*, 250 F.3d 399, 409 (6th Cir. 2001), where it was held that the guest "lacks standing to raise the interesting question of whether the KCDC's policy violates the rights of tenants who wish to entertain guests who are on the no-trespass list." *McBride*, 2014 WL 7891597, at *2 n.5.

392 *Id.* at *2.

393 Nat'l Hous. L. Project, *supra* note 119; Bishop, *supra* note 338.

394 Bishop, *supra* note 338.

395 *Id.*

396 *Id.*

analysis set out in *Mathews v. Eldridge* to measure what due process is owed, in terms of notice and opportunity to be heard.[397]

In addition to the resident, the guest might also be able to make procedural due process arguments, particularly if the landlord's policy "authorizes police . . . to stop, arrest, and detain individuals for mere exercise of constitutional rights to freedom of [association, assembly, and intimate association]."[398] Guests may complain of the "lack of notice of reasons" and that there is no "process and/or notice of process to object" or contest the decision.[399]

4. Fair Housing Act

There may also be avenues of relief possible through fair housing laws. For instance, in the 2004 case *Doe v. County of Kankakee*, "residents of a predominantly African American complex" alleged that the aggressive police enforcement of their building common areas—which occurred through an agreement between their landlord and law enforcement—constituted discrimination in violation of the Fair Housing Act.[400] The agreement gave "authority to the city to control any non-residents found in the common areas,"[401] and the plaintiffs alleged that the aggressive enforcement of that agreement violated § 3604(b) "by discouraging the use of the complex's common areas."[402] Section 3604(b) states that it is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[403] The plaintiffs alleged that the aggressive enforcement was applied "selectively and on the basis of race, color, and national origin."[404] The claim survived a motion to dismiss, and ultimately settled.[405]

This case illuminates the potential of the Fair Housing Act to reach beyond its typical role of redressing intentional discrimination related to the acquisition

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397 *McBride*, 2014 WL 7891597, at *7 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

398 Bishop, *supra* note 338.

399 *Id.*

400 Doe v. Cnty. of Kankakee, No. 03-C-8786, 2004 U.S. Dist. LEXIS 12740, at *2–3 (N.D. Ill. July 6, 2004).

401 *Id.* at *6.

402 *Id.* at *15.

403 *Id.* at *13 (quoting 42 U.S.C. § 3604(b)).

404 *Id.* at *15.

405 Roberto Concepción, Jr., *Untapped Potential of the Fair Housing Act in Addressing Aggressive Enforcement of "Walking While Black or Brown"*, 17 U. PA. J.L. & SOC. CHANGE 383, 397–98 (2014).

of housing, and to potentially address problems with policing housing.[406] The test for such claims is rigorous and difficult to meet, but still possible.[407]

In sum, none of the possible legal claims are perfectly suited to combat landlord bannings. In part because of the slippery, hybrid nature of trespass exclusion itself, and in part because of courts' historical high tolerance for discriminatory housing policies that purport to advance public safety,[408] the best path forward is likely one that looks to the statehouse, rather than the courthouse, for change.

CONCLUSION

As the Supreme Court has affirmed, the "right to maintain control" over one's home, and "to be free from governmental interference" is a "private interest of historic and continuing importance.'"[409] That right is thwarted when a landlord can unilaterally, or in conjunction with police, ban a tenant's guest based on mere suspicion. To be sure, governance inevitably involves competing interests, and "[g]overnmental attempts to preserve order and maintain a safe community inevitably collide with individual citizens' desires to act and move about freely."[410] Sometimes, these order maintenance efforts are justified.[411] Other times, they are not.[412]

Trespass exclusion laws have been critiqued on the basis that they "enhance and extend segregative effects of architectural modes of exclusion[,] . . . undermine constitutional rights and due process, disperse and

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406 Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime Free Housing Ordinances*, 118 MICH. L. REV. 173, 216–17 (2019). The latter type of claim would allege disparate impact. These claims must meet a "burden-shifting test." *Id.* at 218. First, the plaintiff must establish "a prima facie case that a 'challenged practice caused or predictably will cause a discriminatory effect.'" *Id.* (quoting 24 C.F.R. § 100.500(c)(1)). Once the plaintiff has done that, the defendant must prove "that its 'challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.'" *Id.* (quoting 24 C.F.R. § 100.500(c)(2)). If it can do so, the plaintiff must then "establish that the defendant's interest 'could be served by another practice that has a less discriminatory effect.'" *Id.* at 218 (quoting 24 C.F.R. § 100.500(c)(3)).

407 *Id.* at 220. One difficulty is that disparate impact claims like the one in *Doe v. County of Kankakee* require a particular broad policy to be impugned. *Id.* at 219. But each landlord's exclusionary decisions may evade being characterized as a policy, "because of the unique factors that may attend each individual decision." *Id.* at 220. Further, most challenges "are unsuccessful unless the disproportionate impact is considered outrageous and inexplicable on other than grounds of discrimination." JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 5:4 (2019).

408 *See, e.g.*, Swan, *supra* note 97, at 874–75.

409 *Id.* at 898 (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–54 (1993)).

410 RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 1063 (8th ed. 2016).

411 *Id.*

412 *Id.*

extend state surveillance[,] . . . and contribute to the expansion of modernist institutions of control."[413] To justify these negative impacts of enhanced landlord exclusionary powers, it is reasonable to require a demonstrable benefit in terms of public safety and crime reduction.

There is no evidence this benefit exists. Moreover, based on the evidence available from the most similar form of exclusion, banning from public housing, there is good reason to believe that an increase in safety and a reduction in crime are unlikely to follow from these banning practices. A modest reduction in property crime and no reduction at all in violent crime is not enough of a benefit to justify the continuance of these policies.

Moreover, trespass exclusion appears to be part of the broader phenomenon of "'crime control' policies" that ironically "exacerbate the very conditions that lead to crime in the first place."[414] It has been persuasively and repeatedly shown that strong social and familial bonds help prevent and deter crime,[415] yet enhanced landlord exclusion laws work against these bonds, alienating and marginalizing both tenants and visitors, and contributing to the likelihood of the increased crime that the policies purport to stop.

413 Beckett & Herbert, *supra* note 2, at 6.

414 Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 961 (2003).

415 *See* Levy, *supra* note 33, at 540.